

# POACHING

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*The last few years have seen the beginnings of what could become a radical revision of the law's approach to restraints on competition in the labor market. While most attention has been focused on "noncompetes"—agreements between employers and their employees imposing postemployment restraints—there has also been a revival of interest in so-called "no-poaches"—agreements by which employers restrict their ability to hire each other's workers. This new interest includes antitrust challenges and an enhanced skepticism by common law courts about enforcing such agreements. Indeed, as new laws increasingly limit the use of traditional noncompetes, no-poaches have become more attractive to employers and their legality a matter of increasing concern in terms of both overall employee mobility and the fairness of limiting worker opportunities without their knowledge or consent.*

*While the antitrust implications of such agreements have been noted, there has been little scholarship on the common law approach to no-poaches, and court decisions are inconsistent in both analysis and outcome. This Article addresses the common law issue and, in the process, urges a more focused review of no-poaches to narrow their effects in impeding employee mobility. Among other recommendations, it suggests a more skeptical view of supposedly legitimate employer interests in preserving their workforces from competition. And, even where such an interest exists, (1) state courts and legislatures should transplant new restrictions on traditional noncompetes to the no-poach setting; (2) at a minimum, courts should get out of the business of issuing injunctive relief barring the hiring of employees; (3) contractual liquidated damages and "conversion fees" should be limited to amounts consistent with the interests they seek to protect; and (4) no-poach agreements should be unenforceable when the employer terminates the relationship without good cause related to the employee's performance.*

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## INTRODUCTION

The recent scholarly<sup>1</sup> and legislative<sup>2</sup> concerns about restraints on employee mobility have mainly focused on traditional agreements

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1. See, e.g., Charles A. Sullivan, *Noncompetes in a Downsizing World*, 58 SAN DIEGO L. REV. 677 (2021) [hereinafter Sullivan, *Downsizing*] (exploring proposed solutions to the applicability of noncompetes when an employee is terminated without cause); Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 SANTA CLARA L. REV. 663, 678 (2020) [hereinafter Lobel, *Gentlemen*] (describing a variety of vertical restraints imposed by employers on their workers); Rachel S. Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision*, 50 SETON HALL L. REV. 1223, 1224, 1231 (2020) [hereinafter Arnow-Richman, *New Enforcement*] (“Since 2015, there have been dozens of state legislative initiatives, at least three bills introduced to Congress, and a host of regulatory and enforcement efforts at both the state and federal levels targeting employee noncompetes and other agreements that limit mobility.”); Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 853 (2015) (“Restrictions on the flow of knowledge [through noncompetes and other devices] contaminate market flows and diminish both the incentives to move efficiently in the market and the incentives to innovate.”); On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833, 868–69 (2013) (arguing that considering noncompetes’ “economic and behavioral effects on innovation and growth” is important as a matter of policy); ORLY LOBEL, *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING* 51 (2013) (describing the harm done by noncompetes). *But see* Jonathan Barnett & Ted M. Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953, 1045–46 (2020) (disagreeing that the enforcement of noncompetes inhibits innovation). Much of the critical work draws on Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 589–603 (1999).

2. Legislative developments in this area are canvassed in Sullivan, *Downsizing*, *supra* note 1 and Arnow-Richman, *New Enforcement*, *supra* note 1. In addition, the Uniform Law Commission has since promulgated a draft statute that would significantly modify the ground rules governing employee restraints in jurisdictions that adopt it. UNIF. RESTRICTIVE EMP. AGREEMENT ACT (UNIF. L. COMM’N, Draft July 12,

between employers and their employees that impose postemployment restraints on competition (“noncompetes” or “NCAs”),<sup>3</sup> but there has also been a revival of interest in agreements between employers restricting the ability of one to hire those employed by the other. Indeed, as legislatures increasingly restrict the use of NCAs,<sup>4</sup> so-called “no-poach” agreements have become more attractive to employers and their legality a matter of increasing concern.<sup>5</sup>

While also called “no-hire” or “no-switch” agreements, all of those terms can apply to a variety of restraints, but the precise nature of the agreement may be critical to its validity. The prototypical agreement typically prohibits one employer from hiring employees of the other and may or may not contain a reciprocal agreement by the other employer.<sup>6</sup> In either event, it necessarily dampens competition in the relevant labor market.<sup>7</sup> Such agreements were headline news when the Department of Justice (DOJ) filed antitrust suits against some of the biggest technology and entertainment firms in Silicon Valley,

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2021), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9cab4460-b756-ae03-c079-2e632f4d2a75> [https://perma.cc/57BZ-V2A4].

3. For convenience, I generally use the terms NCA and noncompete to include all varieties of protection, including non-solicitation clauses, but the extent of the restraint may be critical to its enforceability, and newer legislation distinguishes between noncompetes, properly so called, and non-solicitation agreements or other lesser restraints. See 2021 Ill. Laws Pub. Act No. 102-358, <https://www.ilga.gov/legislation/publicacts/102/PDF/102-0358.pdf> [https://perma.cc/YG5D-FTEX] (distinguishing between “Covenant not to compete” and “Covenant not to solicit”); see also UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 2 (distinguishing between “noncompete agreement”, “nonsolicitation agreement”, and “no-recruit agreement”).

4. One of the most common legislative responses is to bar NCAs by low-wage workers. Professor Arnow-Richman, *New Enforcement*, lists seven states with such enactments; Illinois, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, and Washington, with bills pending in several others. *New Enforcement*, *supra* note 1, at 1232 n.37. Since then, Virginia, Oregon, and Nevada have joined the list. VA. CODE ANN. § 40.1-28.7:8 (2021); OR. REV. STAT. § 653.295 (2021); NEV. REV. STAT. ANN. § 613.195 (2021). And the District of Columbia has enacted a far broader ban. D.C. CODE § 32-581.01 (2021).

5. Barnett & Sichelman, *supra* note 1, at 990–91 (arguing that the Silicon Valley agreements “illustrate how firms that are precluded from using noncompetes may have strong incentives to use other mechanisms to dampen labor mobility”).

6. See, e.g., Joel W. Mohrman, *Covenants Not to Compete: Make Them Work for You*, 38 THE BRIEF 30, 34 (2008) (describing no-hire agreements).

7. See, e.g., Barnett & Sichelman, *supra* note 1, at 990–91 (explaining how no-hire agreements inhibited competition in the tech sector in Silicon Valley despite California’s ban on noncompetes).

challenging their agreements not to hire<sup>8</sup> certain kinds of highly-valued workers employed by the others.<sup>9</sup> The cases were resolved by consent decrees with the defendants, but class actions were subsequently brought by the workers whose compensation was allegedly suppressed by the agreements, leading to a large settlement.<sup>10</sup> Thereafter, the DOJ's Antitrust Division and the Federal Trade Commission signaled new concern for this kind of anticompetitive agreement, issuing *Antitrust Guidance for Human Resource Professionals* (*Antitrust Guidance*),<sup>11</sup> and Justice has since filed criminal charges for

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8. Defendants in the suits included various combinations of eBay, Intuit, Lucasfilm, Pixar, Adobe, Apple, Google, and Intel. Press Release, U.S. Dep't of Just., *Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements* (Sept. 24, 2010), <https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee> [<https://perma.cc/2RBD-LLRM>]. Some of the agreements purported only to bar solicitation of each other's workers or to limit the range of compensation paid. *Id.*

9. This is only one part of a renewed interest on the antitrust implications of restraints affecting labor markets. See *NCAA v. Alston*, 141 S. Ct. 2141 (2021). See generally Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165, 190–91 (2000) (describing the impact that noncompetes have on labor market competition, including deterring market entry); Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1393–94 (2020); Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1031 (2019). For earlier analysis, see Charles A. Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restraints of Trade*, 1977 U. ILL. L.F. 621, 666–67 (1977).

10. Eric S. Hochstadt & Nicholas J. Pappas, *Restrictions on Employee Change of Jobs: Antitrust Challenges to "Non-Compete" and "No-Poach" Clauses*, 34 A.B.A. J. LAB. & EMP. L. 253, 261 (2020). More recently, Duke University and the University of North Carolina agreed to settle a suit challenging alleged no-poach agreements by paying professors \$19 million. Julian Shen-Berro & Kate Murphy, *UNC, Duke Professors Get Paid from \$19 Million Settlement in Alleged Hiring Scheme*, NEWS & OBSERVER (Oct. 27, 2021), <https://www.newsobserver.com/news/local/education/article255247771.html>.

11. U.S. DEP'T OF JUST., ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016), <https://www.justice.gov/atr/file/903511/download> [<https://perma.cc/CB6B-BG38>]. The Guidance specifies that contracting firms need not compete in any other sense for such agreements to be subject to the antitrust laws: "From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services." *Id.* at 2. See generally Rochella T. Davis, *Talent Can't Be Allocated: A Labor Economics Justification for No-Poaching Agreement Criminality in Antitrust Regulation*, 12 BROOK. J. CORP. FIN. & COM. L. 279, 279, 309–10 (2018).

such conduct.<sup>12</sup> President Joseph R. Biden, Jr.'s recent Executive Order may portend further substantial developments in this area.<sup>13</sup>

But the Silicon Valley agreements were challenged as what antitrust folk call “naked” restraints, i.e., agreements restricting competition that are not “ancillary” to some other productive economic collaboration between the parties.<sup>14</sup> Such agreements are often per se illegal under the Sherman Act, and *Antitrust Guidance* in fact threatens

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12. *E.g.*, Press Release, U.S. Dep’t of Just., Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses, (Mar. 30, 2021), <https://www.justice.gov/opa/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school-nurses> [<https://perma.cc/F2FS-PQGN>]; Press Release, U.S. Dep’t of Just., Health Care Company Indicted for Labor Market Collusion, (Jan. 7, 2021), <https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion> [<https://perma.cc/G2UR-2EFT>]. State antitrust suits have also been brought. *See* Brian E. Spang & Angel A. Perez, *Illinois Attorney General’s Office on the Lookout for Unlawful No-Poach Agreements*, EPSTEIN BECKER GREEN (June 23, 2021) <https://www.tradesecretsandemployeemobility.com/2021/06/articles/non-compete-agreements/illinois-attorney-generals-office-on-the-lookout-for-unlawful-no-poach-agreements> [<https://perma.cc/54LN-G79F>] (noting the Attorney General of Illinois filed suit).

13. Section 5 of E.O. 14036 (July 9, 2020) provides that

(f) To better protect workers from wage collusion, the Attorney General and the Chair of the FTC are encouraged to consider whether to revise the Antitrust Guidance for Human Resource Professionals of October 2016.

(g) To address agreements that may unduly limit workers’ ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC’s statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.

Exec. Order No. 14036, 86 Fed. Reg. 36,987, 36,992 (July 9, 2021).

14. This principle partially maps onto the distinction in antitrust law between horizontal and vertical restraints. In many cases, no-poach agreements apply to buyers and sellers of labor and therefore are vertical and arguably subject to a rule of reason analysis. *But see* Jane R. Flanagan, *Fissured Opportunity: How Staffing Agencies Stifle Labor Market Competition and Keep Workers “Temp”*, 20 J.L. SOC’Y 247, 256–57 (2020) (arguing that staffing services agreements barring a worksite employer from hiring a temp who formerly worked for that staffing agency through any other third-party staffing agency function as horizontal agreements between the staffing firms). Whether and when restraints between franchisors and franchisees are more properly viewed as horizontal or vertical is another issue. *See* *Deslandes v. McDonald’s USA, LLC*, No. 17-4857, 2018 U.S. Dist. LEXIS 105260, at \*18–19 (N.D. Ill. June 25, 2018). Whether the categorization matters in the ultimate balancing of pro- and anti-competitive effects is yet another question. *See Alston*, 141 S. Ct. at 2141, 2162, 2164, 2166 (finding certain restraints on compensation of sellers of labor invalid despite being adopted in the context of creating a market for college sports).

criminal prosecution of naked no-poaching arrangements<sup>15</sup> while distinguishing them from similar agreements that are part of a broader economic cooperation between the contracting firms.<sup>16</sup> Although the latter agreements may still be challenged under the antitrust laws under a “rule of reason” analysis,<sup>17</sup> they will survive those challenges if “reasonable.”<sup>18</sup> So far, federal antitrust enforcement agencies have not focused on such ancillary arrangements, although state antitrust authorities<sup>19</sup> and private suits have challenged such restraints in the franchise context.<sup>20</sup> Thus far, then, ancillary no-poach agreements between employers are mostly left to state contract law to regulate, just as is true with more common NCAs entered into between employers and their employees (another kind of ancillary restraint).<sup>21</sup>

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15. U.S. DEP’T OF JUST., *supra* note 11, at 1, 4.

16. *Id.* at 3 (“Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws. That means that if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects. Legitimate joint ventures (including, for example, appropriate shared use of facilities) are not considered per se illegal under the antitrust laws.”).

17. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898), *aff’d as modified*, 175 U.S. 211 (1899), where then-Judge Taft wrote:

[N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits . . . .

18. *See* Eichorn v. AT&T Corp., 248 F.3d 131, 136 (3d Cir. 2001) (upholding no-poach agreement ancillary to the sale of a business).

19. *See* Arnov-Richman, *New Enforcement*, *supra* note 1, at 1233–34 (detailing initiatives by the State of Washington Attorney General against such provisions in franchise contracts).

20. *See* Lobel, *Gentlemen*, *supra* note 1, at 672–73 (reporting class actions challenging franchise no-hire agreements by “many fast food franchises including Carl Karcher Enterprises (Carl’s Jr.), McDonald’s, Pizza Hut, Jimmy John’s, Arby’s, Cinnabon, Little Caesars, Burger King, and Dunkin Donuts”).

21. *Ixchel Pharma, LLC v. Biogen, Inc.*, 470 P.3d 571, 580 (Cal. 2020), construed § 16000 of California’s Business and Professional Code, which voids “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind.” The Court held this proscription reached agreements between businesses, not merely those in the employment relationship, but also held that they are to be assessed under a rule of reason analysis, which recognizes the procompetitive possibility of some restraints. *Id.* at 589 (“In certain circumstances, contractual limitations on the freedom to engage in commercial dealings can promote competition. Businesses engaged in commerce routinely employ legitimate

And there's the rub since the common law is both sparse and splintered when it comes to no-poach agreements. Although it seems almost certain that courts will, like the antitrust laws, refuse to enforce naked no-hire agreements, it is less clear what they will do about ancillary ones, or even the appropriate analysis. This Article, then, considers what the correct approach should be. It begins in Part I by exploring the use of no-poach agreements in the American economy. Part II then surveys the current legal landscape. Part III then considers some remedial complications with enforcing such agreements. Finally, Part IV takes a fresh look at the entire topic.

### I. THE USE OF NO-POACH AGREEMENTS

As commonly used, “no-poach” encompasses a wide variety of efforts by employers to restrict the mobility of their workers<sup>22</sup> by limiting competition from potential alternative employers. Such agreements can take a number of forms. They may be reciprocal and bar each employer from hiring the other’s workers or restrict only one employer from hiring the counterparty’s workers.<sup>23</sup> Further, those affected workers may be only current employees or future ones.<sup>24</sup> There also may be significant differences in the restrictions imposed. For example, some may bar hiring, others only solicitation of employees; some may flatly bar employment while others may do so only for a period of time, and, for the latter, that period may run from the end of the no-poach agreement or some earlier point.<sup>25</sup> No-poach agreements always restrict an employer from directly employing a

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partnership and exclusive dealing arrangements, which limit the parties’ freedom to engage in commerce with third parties. Such arrangements can help businesses leverage complementary capabilities, ensure stability in supply or demand, and protect their research, development, and marketing efforts from being exploited by contractual partners.”).

22. This Article will use the words “employee” and “worker” interchangeably while recognizing that a given person may or may not be an “employee” of either or both parties under various employment regulation regimes.

23. See Mohrman, *supra* note 6.

24. See, e.g., Barry F. Rosen, *No Hire Clauses – Are They Legal?*, GORDON FEINBLATT LLC (Mar. 23, 2003), <https://www.gfrlaw.com/what-we-do/insights/no-hire-clauses-are-they-legal> [<https://perma.cc/QS7Z-6FYP>] (explaining no-hire agreements, like non-compete agreements between an employee and their employer, restrict employees’ future employment).

25. See, e.g., *No-Hire Sample Clauses*, L. INSIDER, <https://www.lawinsider.com/clause/no-hire> [<https://perma.cc/MSR9-PH64>] (providing examples of no-hire clause language).

worker, but some such agreements purport to bar the employer from indirectly using the worker's services as well.<sup>26</sup> And agreements may limit compensation or benefits even though they permit hiring.<sup>27</sup> In addition, the structure of such agreements can differ. Some restrictions are framed in terms of hiring being a breach of contract, while others simply charge a "conversion fee" per employee hired.<sup>28</sup> Where the at-issue conduct is described as a "breach," many agreements will provide for liquidated damages.<sup>29</sup>

While we will see that some of these variations may make a difference to an agreement's enforceability, for the moment, this Article will speak generally of "no-poach" or "no-hire" agreements. Notably, the workers whose opportunities are limited by such agreements may or may not be aware of them, but, in any event, their consent is not required.<sup>30</sup>

Versions of no-poach agreements exist in a variety of settings, but their use has not been extensively studied. What empirical information we have largely comes from model franchise contracts,<sup>31</sup> litigation documents, and public records when one of the contracting parties is a governmental entity.<sup>32</sup> The business reasons for seeking restrictions

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26. See *Szabo Food Serv., Inc. v. Cty. of Cook*, 513 N.E.2d 875, 877 (Ill. App. Ct. 1987) (refusing to enforce such an agreement); see also Flanagan, *supra* note 14, at 258 ("Most of the staffing services agreements I reviewed also contained provisions that discouraged or barred a worksite employer from hiring a temp who formerly worked for that staffing agency through any other third-party staffing agency, not party to the contract. Often the liquidated damages or fee to the worksite employer for hiring a temp through a third party was higher than if the worksite employer hired them directly.").

27. Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, 21 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24831), <https://www.nber.org/papers/w24831> [<https://perma.cc/RC82-TTH3>] (speculating that franchise no-poach agreements may be partially responsible for sluggish wage growth).

28. See discussion in text beginning *infra* note 150.

29. *Id.*

30. See *How Fair—or Legal—Are Non-Poaching Agreements?*, KNOWLEDGE WHARTON (July 17, 2018), <https://knowledge.wharton.upenn.edu/article/how-fair-or-legal-are-non-poaching-agreements> [<https://perma.cc/EQ6D-83VA>] (explaining that employees do not consent to no-hire agreements).

31. See Krueger & Ashenfelter, *supra* note 27 ("[W]e find that 'no poaching of workers agreements' are included in a surprising 58 percent of major franchisors' contracts, including McDonald's, Burger King, Jiffy Lube and H&R Block.").

32. See discussion in text beginning *infra* note 45.

are often easy to understand,<sup>33</sup> but the overall economic impact of such restraints is less clear, especially since such agreements are sometimes belt-and-suspenders efforts to supplement more traditional noncompetition agreements with employees.<sup>34</sup>

Some of the more common settings are:

*Acquisitions and Other Collaborations.* Where one business explores acquiring another, the human talent of the target firm is often a very important asset, one whose value could be substantially reduced if the putative acquirer could freely hire individual workers.<sup>35</sup> Accordingly, a no-hire agreement often is included in the ubiquitous non-disclosure agreements used in such transactions.<sup>36</sup> Alternatively, two firms may cooperate in a project or more extensive joint venture that requires collaboration between their respective employees. In such setting, each may seek to protect its talent from raiding by the other.<sup>37</sup>

*Placement, Leasing, or Staffing Firms.* For a variety of reasons, “client” firms often seek to obtain workers from another entity that is, formally at least, the workers’ employer.<sup>38</sup> Although the origins of what is often

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33. For a collection of examples of such agreements in one economic sector, see W. Eugene Basanta, “No-Hire” Clauses in Healthcare Sector Contracts: Their Use and Enforceability, 39 J. HEALTH & LIFE SCI. 451, 451, 455–60, 463, 471–72 (2006), explaining that no-hire clauses “protect the professional group’s investment of time and money for recruiting, training, and establishing the employee’s clinical practice” and “give the professional group leverage to retain its employees.”

34. Where the employee in question has a valid NCA, a coextensive no-poach agreement would seem harmless.

35. See Daniel J. O’Brien, Note, *The Enforceability of No-Hire Provisions in Mergers, Acquisitions and Other Entrepreneurial Ventures*, 3 ENTREPREN. BUS. L.J. 113, 113–14 (2008); David K. Haase & Darren M. Mungerson, *Agreements Between Employers Not to Hire Each Other’s Employees: When Are They Enforceable?*, 21 LABOR LAW. 277, 277–78 (2006).

36. See *Pactiv Corp. v. Menasha Corp.*, 261 F. Supp. 2d 1009, 1015 (N.D. Ill. 2003) (declining to enforce as overbroad a “no hire” agreement entered into as part of unsuccessful negotiations for sale of a business).

37. E.g., *GeoDecisions v. Data Transfer Sols., LLC*, No. 2180, 2010 U.S. Dist. LEXIS 128283, at \*32–34 (M.D. Pa. Dec. 3, 2010). But see *Pittsburgh Logistics Sys. v. Beemac Trucking, LLC*, 249 A.3d 918, 920, 936 (Pa. 2021). See discussion in text beginning *infra* note 70.

38. See Susan N. Houseman & Carolyn Heinrich, *Temporary Help Employment in Recession and Recovery*, 1 (Upjohn Inst. Emp. Rsch., Working Paper No. 15-227, 2015), <https://doi.org/10.17848/wp15-227> [<https://perma.cc/5TRJ-DK5Z>] (“During the last recession, the largest since the Great Depression of the 1930s, employment in the temporary help industry contracted by 30 percent and accounted for 11 percent of net employment losses economy-wide. Correspondingly, the temporary help industry has

called the “temp” industry can be traced to providing women workers for short-term clerical assignments, today’s industry staffs a wide variety of white-collar and blue-collar positions across a range of sectors of the economy and often provides workers on a semi-permanent basis.<sup>39</sup> A firm that supplies such employees may go by a variety of names—a staffing or temp agency or a placement or “leasing”<sup>40</sup> company.<sup>41</sup> Typically, the staffing agency charges the client per hour worked by the employee and pays the employee a lower rate, the difference being its margin.<sup>42</sup> In addition to providing the staffing firm with a profit, that margin compensates the staffing firm for the costs of the services it provides and risk it assumes.<sup>43</sup> To protect that stream of income and its investment in recruiting and perhaps training the workers it provides, the staffing firm will typically seek to prevent the client firm from siphoning off its human inventory by limiting such hires through some version of a no-poach agreement.<sup>44</sup>

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accounted for over 13 percent of net employment gains since the official end of the recession in June 2009.”).

39. Erin Hatton, *The Temp Industry and the Transformation of Work in America* 18 (2007) (Ph.D. dissertation, University of Wisconsin-Madison) (ProQuest).

40. See Steven L. Willborn, *Leased Workers: Vulnerability and the Need for Special Legislation*, 19 COMP. LAB. L. & POL’Y J. 85, 85–86, 88 (1997) (“Leased workers, in this context, means workers who are employed by one organization (the ‘leasing company’), but who perform work for and under the primary supervision of another organization.”). Willborn argues that one of the main drivers of such arrangements is enabling employers to deal with fluctuations in the workforce while retaining a core of more permanent workers; he analogizes the arrangement to traditional hiring halls.

41. See generally DAVID WEIL, *THE FISSURED WORKPLACE* 271–74 (2014) (describing types of contingent work); Cynthia Estlund, *Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace*, 12 LEWIS & CLARK L. REV. 671, 685–86 (2008) (discussing the potential need to extend accountability for labor practices “down the ladder” to large firms that engage contractors that supply labor needs); Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 255–56 (2006) (discussing agency work and employee leasing).

42. Flanagan, *supra* note 14, at 248. A recent case rejected an antitrust challenge to just such an arrangement. *Aya Healthcare Servs. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1106 (9th Cir. 2021) (“This case involves the non-solicitation provision within that contract. We conclude that this provision is both ancillary to the parties’ broader agreement to collaborate, and a reasonable, pro-competitive restraint.”).

43. Flanagan, *supra* note 14, at 248.

44. *Id.* Flanagan describes the structure and basic economics of many such arrangements:

Unlike in the old employment agency model, in which an employee pays an up-front, one-time fee for placement in a permanent job; or the “headhunter”

We know more about practices in this sector than some others thanks to a recent article. Jane Flanagan examined forty-five staffing services contracts that became public either because of litigation or through public records requests.<sup>45</sup> While not a random sample, the contracts included “those used by some of the largest staffing companies in the world, e.g., Kelly Services, Adecco, Manpower, AMN Healthcare, Tradesmen International.”<sup>46</sup> Flanagan reported that “[a]round 75% (34 contracts) contained either a prohibition or disincentive to the worksite employer hiring a temp worker directly.” Some contracts characterized the hire as a breach of contract (and may provide for “liquidated damages” when such hires occur).<sup>47</sup> Others did not so view the hire but rather imposed a “conversion fee.”<sup>48</sup> The amounts in the sample ranged from relatively minimal charges<sup>49</sup> to very

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model, in which the employer pays a one-time fee for finding a qualified employee to fill a permanent job; staffing agencies place workers with a worksite employer but continue to act as the employer of record after that placement. They receive a markup or fee for every hour of work performed by one of their “temporary” employees. In exchange, staffing agencies handle payroll, track hours of work, and make required unemployment insurance and workers’ compensation contributions.

Such workers may or may not also be viewed by some legal regimes as jointly employed by what Flanagan refers to as the worksite employer or client. *See* TIMOTHY P. GLYNN, CHARLES A. SULLIVAN, & RACHEL ARNOW-RICHMAN, *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* 60–62 (2019). To the extent, however, the worksite employer is not viewed as employing the workers, it will have effectively outsourced its legal compliance responsibilities.

45. One theme of her article, not further explored here, is that staffing firms engage in the deceptive practices of marketing their services to workers as a path to permanent employment with the client when in fact very few such “temps” will ultimately become employees of the client to which they are assigned, in large part precisely because of no-poach agreements. Flanagan, *supra* note 14, at 252–53.

46. *Id.* at 253–54.

47. *Id.* at 254. Where damages rather than an injunction are sought, such a clause may be necessary to avoid the problems of insufficient certainty for an award of expectation damages. *See, e.g.,* *Blase Indus. Corp. v. Anorad Corp.*, 442 F.3d 235, 236 (5th Cir. 2006) (finding proof of lost profits from loss of employee too uncertain to be awarded when the employee was at will). *See* discussion in text beginning *infra* note 150.

48. Flanagan, *supra* note 14, at 256.

49. A “standard services agreement” used by the staffing firm Manpower provided for a “flat, one-time placement fee in the amount of \$500” for any assigned employee who was recruited. *Id.* at 256. Some contracts had a sliding scale, with lower charges the longer the employee worked before being hired. *Id.* (A contract, between the staffing firm Adecco and the company Hearbest “contained a chart establishing a conversion fee of 30% if Hearbest hired a temp directly after 1–160 hours; 25% after

substantial payments.<sup>50</sup> Flanagan argued that that fee structure tends to keep “temp” employees undercompensated.<sup>51</sup>

*Franchises.* Different yet, franchisors frequently bar intra-franchise hiring of employees. That is, franchisees are barred from hiring, or at least soliciting, employees of other franchisees. If a franchisor operates its own outlets, it may also be barred from the same conduct.<sup>52</sup> One justification is to keep training costs down by preventing other franchisees from free riding on those who devote significant resources to that effort,<sup>53</sup> although one might ask whether the business in question, typically a fast-food establishment, entails much training to begin with for most employees.<sup>54</sup> In any event, the restraints arguably

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161–480 hours, and so on, decreasing to a flat conversion rate of \$ 1,500 per temp once the temp had performed over 1441 hours (or 180 eight-hour days) of work”). The fee sometimes decreased to zero over time. *Id.* at 257 (“A number of contracts I examined did have conversion fees that declined to no cost after the temp had performed between 3–6 months of work.”). She concludes: “So there does appear to be real variation in the amount and severity of disincentives that staffing agencies impose on worksite employers for direct hiring.” *Id.*

50. *Id.* at 255 (citing a nurse staffing agency contract providing for either 180-day notice of intent to hire or payment of “liquidated damages equal to the greater of: five thousand dollars (\$5,000) or the sum of thirty percent (30%) of such Personnel’s annualized salary”); *id.* at 255–56 (citing an airline industry staffing firm contract providing for liquidated damages in the amount of 25% of the employee’s first year salary should the Client solicit or hire a Contract Employee within twelve months of that Contract Employee’s last day of work at Client). Note that this clause purports to impose liquidated damages for a solicitation that does not result in a hire, which would seem to raise the question as to whether there are any recoverable damages at all.

51. *Id.* at 249 (“[T]emp work is demonstrably worse for workers than traditional employment, not only because temps have a harder time enforcing core employment protections, but also because temp staffing agencies curtail employees’ opportunity to use skills acquired on the job to advance, gain upward mobility, or demand better working conditions.”).

52. Michael Iadevaia, *Poach-No-More: Antitrust Considerations of Intra-Franchise No-Poach Agreements*, 35 A.B.A. J. LAB. & EMP. L. 151, 152 (2020).

53. *Id.* at 174.

54. For example, for a number of years the McDonald’s standard agreement provided:

Interference With Employment Relations of Others. During the term of this Franchise, Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald’s, any of its subsidiaries, or by any person who is at the time operating a McDonald’s restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph [] shall not be violated if such person has left the employ of any of the foregoing parties for a period in excess of six (6) months.

tend to keep the parties' personnel costs down by preventing employees from switching franchises for higher wages.<sup>55</sup> Indeed, it may be significant that such agreements not only bar hiring but also bar seeking to hire,<sup>56</sup> which might put pressure on the current employer to raise wages even if no actual job switch occurs. The extent to which such efforts will work to suppress wages is another question since presumably workers can switch to different branded franchises.

*Outsourcing Functions.* In some situations, firms may outsource a function entirely.<sup>57</sup> Although this has some similarities to temp employment, there is little or no integration of the workers of each employer.<sup>58</sup> Examples range from sophisticated professional services, such as a hospital's outsourcing of its emergency room, anesthesiology services, or pathology functions, to low-wage, low-skill functions, such as a law school's outsourcing of cleaning, security, and food services.<sup>59</sup> Regardless of whether the worksite owner might seek to directly hire the workers of its service provider in such settings, the service provider might want to fence out potential competitors for the account by

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Deslandes v. McDonald's USA, LLC, No. 17-4857, 2018 U.S. Dist. LEXIS 105260, at \*5 (N.D. Ill. June 25, 2018) (alteration in original). It may be significant that McDonald's engages in serious training for at least some workers. *See id.* at \*22–23 (noting “expensive training at [McDonald's] Hamburger University” but also noting that the challenged restraint “applies even to entry-level employees with no management training”).

55. Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 658 (2021) (such agreements enable franchisors and franchisees to suppress labor costs).

56. *See generally* Iadevaia, *supra* note 52, at 152–53 (providing a no-poach clause that prohibits a franchisee from employing or seeking to employ any other McDonald's employee).

57. *See, e.g.*, Hafiz, *supra* note 55, at 716 (mentioning some companies outsource).

58. *See* Alexandra Twin, *Outsourcing*, INVESTOPEDIA (Aug. 29, 2021), <https://www.investopedia.com/terms/o/outsourcing.asp> [<https://perma.cc/Y996-GF58>] (explaining that outside organizations have different compensation structures with their employees than the in-house organization).

59. *See Outsourcing Emergency Care – Not as Seamless as It Sounds*, UNIV. S. CAL., <https://healthadministrationdegree.usc.edu/blog/outsourcing-emergency-care-not-as-seamless-as-it-sounds> [<https://perma.cc/X43G-CNU3>] (noting hospitals' outsourcing emergency care has recently become more prevalent); Leonard L. Berry & Paul Barach, *Hospitals Often Outsource Important Services to Companies That Prioritize Profit over Patients*, CONVERSATION (Aug. 20, 2021), <https://theconversation.com/hospitals-often-outsource-important-services-to-companies-that-prioritize-profit-over-patients-165875> [<https://perma.cc/5VYF-2V2M>] (mentioning that hospitals outsource anesthesia services); *see, e.g., Dining*, AM. U., <https://www.american.edu/about/sustainability/campus-greening/dining.cfm> [<https://perma.cc/E627-CWGU>] (acknowledging that American University outsources dining to the service provider Chartwells).

extracting a clause committing the owner to require any replacement firm not to hire its employees.<sup>60</sup>

No-poaching restraints are only one way to restrict employee mobility, and one question is how they relate to other methods by which an employer may seek to do so. Two are obvious,<sup>61</sup> although neither is very attractive to employers. First, there are durational contracts with workers. Where such contracts exist, no-hire agreements are mostly belt-and-suspenders since the employer has both a contract claim against the employee departing during the term of employment and a possible intentional interference with contract claim against the new employer.<sup>62</sup> Employers, however, are notoriously committed to at-will employment, so this will relatively rarely be the route chosen.<sup>63</sup> Second, the employer can require noncompetition agreements from its employees to foreclose switching. But, obviously, an NCA will work only if the new employer is a competitor,<sup>64</sup> and often no-poaching agreements are not between competitors as sellers in any product or

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60. See *Hosp. Consultants, Inc. v. Potyka*, 531 S.W.2d 657, 664 (Tex. Civ. App. 1975) (refusing to enforce an agreement, the court viewed as significant the fact that the Hospital terminated one contract for emergency department services and replaced it with a second contractor).

61. A third, more remote, possibility is trade secret law. While that law does not generally prohibit competition per se as opposed to the misuse of protected information, a few courts advance an “inevitable disclosure” doctrine that justifies enjoining working for a competitor on the theory that such employment will necessarily entail the disclosure of trade secrets. *E.g.*, *PepsiCo Inc. v. Redmond*, 54 F.3d 1262, 1269 (7th Cir. 1995) (holding that competition can be enjoined, even absent an NCA, given the inevitableness of disclosure). The doctrine has been much criticized, *e.g.*, ALAN HYDE, *WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET* 34–35 (2003). It has been rejected by other courts, *e.g.*, *Holton v. Physician Oncology Servs., LP*, 742 S.E.2d 702, 703 (Ga. 2013) (no stand-alone inevitable disclosure doctrine in Georgia); statutes, *see* Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, § 3(a), 130 Stat. 376; and the American Law Institute, *see* RESTATEMENT OF EMP. L. § 8.05 cmt. b (AM. L. INST. 2021). It seems likely, therefore, that future suits will focus on actual use of, or some basis to suspect an intent to use, trade secrets.

62. See RESTATEMENT (SECOND) OF TORTS § 766 (AM. L. INST. 1965).

63. See Julie Ritzer Ross, *Should You Hire At-Will Employees?*, BUS. NEWS DAILY (Sept. 24, 2020), <https://www.businessnewsdaily.com/15833-hire-at-will-employees.html> [<https://perma.cc/B344-QW8H>] (noting at-will employment is common in the United States).

64. See *Ex parte* *Howell Eng'g & Surveying, Inc.*, 981 So. 2d 413, 423 (Ala. 2006), *overruling* *Dyson Conveyor Maint., Inc. v. Young & Vann Supply Co.*, 529 So. 2d 212, 216 (Ala. 1988), which had held under a state statute that no-poaches are per se unenforceable absent an NCA with the foreclosed employees.

service market;<sup>65</sup> rather, they compete only as buyers in the labor market.<sup>66</sup> Further, noncompetes will often be unenforceable even where product competition exists, such as in the franchise example, where employers typically lack the legitimate interests required by the law for enforcement.<sup>67</sup>

## II. THE COMMON LAW OF NO-POACH AGREEMENTS

Relatively few cases consider the common law enforceability of a no-poach contract between employers. This is not exactly surprising because, after all, those not hired are the employees who in many cases may not even know of<sup>68</sup> the existence of such an agreement and, in any event, are not well-positioned to challenge an agreement to which they are not a party.<sup>69</sup>

The cases that do exist, then, are typically those in which one of the parties to the agreement regrets its commitment, violates it by hiring the counterparty's workers, gets sued, and raises public policy arguments as a defense. Such a case was the Supreme Court of Pennsylvania's recent decision in *Pittsburgh Logistics Systems v. Beemac Trucking, LLC*,<sup>70</sup> which struck down a no-poach agreement ancillary to

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65. The franchise setting will often be an exception.

66. The Supreme Court's recent decision in *NCAA v. Alston*, 141 S. Ct. 2141, 2147 (2021), may signal a renewed concern for restraints affecting competition in the labor market. *See also id.* at 2169 (Kavanaugh, J., concurring) ("Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.").

67. This is true even under traditional legal approaches but has been magnified by recent limitations on use of NCAs for low-wage workers, often making no-poach agreements the only game in town for a franchisor that wishes to restrict intra-franchise wage competition. *See supra* note 4.

68. *See How Fair—or Legal—Are Non-Poaching Agreements?*, KNOWLEDGE WHARTON (July 17, 2018), <https://knowledge.wharton.upenn.edu/article/how-fair-or-legal-are-non-poaching-agreements> [<https://perma.cc/EQ6D-83VA>] ("The big problem here is that all of this is invisible to the worker," said [Evan] Starr. "The worker does not agree to this [agreement]. If they don't get along with their manager, or if they learn that it's not a good work environment, or perhaps they have to move locations for some reasons, and their skills are basically perfectly transferable to another franchise within that same company, then they're not able to do that.").

69. *But see* *Hosp. Consultants, Inc. v. Potyka*, 531 S.W.2d 657, 664 (Tex. Civ. App. 1975) (restrained employees sought declaratory judgment of invalidity).

70. 249 A.3d 918 (Pa. 2021).

a services contract between business entities.<sup>71</sup> The opinion, while leaving many questions unanswered, offers an opportunity to survey the competing arguments.

Plaintiff Pittsburgh Logistics Systems, Inc. (“PLS”) contracted with Beemac Trucking, LLC to carry freight under an agreement that barred Beemac, during the term of the contract or for two years thereafter, from “directly or indirectly, hir[ing], solicit[ing] for employment, induc[ing] or attempt[ing] to induce any employees of PLS or any of its Affiliates to leave their employment with PLS or any Affiliate for any reason.”<sup>72</sup> Needless to say, Beemac breached, and PLS sued both Beemac and PLS’s former employees in separate actions.<sup>73</sup> The claims against Beemac included breach of contract and tortious interference with contract and, against the former employees, breach of noncompetition and non-solicitation provisions in their employment contracts with PLS.<sup>74</sup>

The results in the courts below were somewhat of a mixed bag,<sup>75</sup> but this opinion focused on the no-hire agreement. The Supreme Court of Pennsylvania noted the antitrust implications of such agreements<sup>76</sup> and reviewed caselaw for other jurisdictions, which it viewed as split more or less down the middle on enforceability.<sup>77</sup> In the case before it, the court recognized PLS’s “legitimate interest in preventing its business partners from poaching its employees, who had developed specialized knowledge and expertise in the logistics industry during their training at PLS.”<sup>78</sup>

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71. *Id.* at 920, 936.

72. *Id.* at 921.

73. *Id.*

74. *Id.*

75. The restraints on the employees were largely unenforceable although they were limited in certain respects. *Id.* at 921–22 (striking down one employment agreement and invalidating an overbroad restraint in three others but upholding some non-solicitation of PLS clients; however, the employees “were not enjoined from working for Beemac”).

76. *Id.* at 932–33. It cited statements of interest filed by the DOJ in *In re Railway Industry Employee No-Poach Antitrust Litigation*, 395 F. Supp. 3d 464, 485 (W.D. Pa. 2019). See *Seaman v. Duke Univ.*, No. 15-CV-462, 2019 WL 4674758, at \*1 (M.D.N.C. Sept. 25, 2019); Brief of Amicus Curiae Josh Shapiro, Attorney General of the Commonwealth of Pennsylvania in Support of Appellee at 4, 12–13, *Pittsburgh Logistics*, 249 A.3d 918 (No. 31 WAP 2019) (recounting state efforts to challenge certain no-poach agreements).

77. *Pittsburgh Logistics*, 249 A.3d at 924.

78. *Id.* at 936.

But such ancillarity was not the end of the matter. Although Pennsylvania law on restrictive covenants had developed mainly in the context of agreements between employers and employees, the court thought those basic principles applied to an agreement between two employers.<sup>79</sup> Such an agreement must not only be “ancillary to an otherwise valid contract”<sup>80</sup> but also reasonable “in light of the parties’ interests that the restraint aims to protect and the harm to other contractual parties and the public.”<sup>81</sup> The court found that the *Restatement (Second) of Contracts* struck the right balance by declaring nonancillary restraints between employers and their workers unenforceable<sup>82</sup> while permitting *reasonable* ancillary restraints,<sup>83</sup> including a promise by an employee not to compete with his employer.<sup>84</sup> It also saw this as consistent with the approach of the DOJ to the question under the antitrust laws.<sup>85</sup>

While the at-issue agreement satisfied the ancillary requirement, the restraint (again, as much as three years since it covered the one-year term of the agreement and two years thereafter) was “both greater than needed to protect PLS’s interest and create[d] a probability of harm to the public.”<sup>86</sup> As to the former, the agreement was overbroad because it “precluded Beemac from hiring or soliciting all PLS employees, regardless of whether the PLS employees had worked with

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79. See *Adecco USA, Inc. v. Staffworks, Inc.*, No. 20-CV-744, 2020 WL 7028872, at \*10 (N.D.N.Y. Sept. 15, 2020) (“In evaluating non-solicitation of co-workers, or non-recruitment agreements, courts are to apply the same three-prong test as is applied to other restrictive covenants.”); cf. *Ingersoll-Rand Co. v. Ciavatta*, 542 A.2d 879, 888 (N.J. 1988) (applying New Jersey restrictive covenant law to the enforceability of employee “holdover” clauses providing rights to inventions made even after employment ends).

80. *Pittsburgh Logistics*, 249 A.3d at 935.

81. *Id.*

82. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 188(1) (AM. L. INST. 1981)).

83. § 188(1) (“A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if (a) the restraint is greater than is needed to protect the promisee’s legitimate interest, or (b) the promisee’s need is outweighed by the hardship to the promisor and the likely injury to the public.”).

84. *Id.* § 188(2)(b); see *infra* note 200. The other listed situations where a reasonable restraint will be permitted are sales of business and agreements by a partner not to compete with the partnership.

85. *Pittsburgh Logistics*, 249 A.3d at 935. See discussion *supra* beginning at note 76.

86. *Pittsburgh Logistics*, 249 A.3d at 935–36.

Beemac during the term of the contract.”<sup>87</sup> As for harm to the public, the “provision impairs the employment opportunities and job mobility of PLS employees, who are not parties to the contract, without their knowledge or consent and without providing consideration in exchange for this impairment.”<sup>88</sup> This injury was not hypothetical since PLS sought to enjoin Beemac from employing the former PLS workers: “If PLS was successful, the effect of its enforcement of the no-hire provision would have deprived its former employees of their current jobs and livelihoods.”<sup>89</sup> The court added that, “[m]oreover, the no-hire provision undermines free competition in the labor market in the shipping and logistics industry, which creates a likelihood of harm to the general public.”<sup>90</sup> In summary, “[b]alancing PLS’s interest against the overbreadth of the no-hire provision and the likelihood of harm to the public, we conclude that the no-hire provision is unreasonabl[e] in restraint of trade and therefore unenforceable.”<sup>91</sup>

The court, however, seemed to stop short of holding no-poaching agreements to be per se invalid while apparently ruling out any injunctive relief.<sup>92</sup> In other words, while PLS could presumably cure the overbreadth problem with narrower drafting, any court order to not hire workers of a counterparty would necessarily impact third parties.<sup>93</sup> Thus, either these agreements are always unenforceable in Pennsylvania,<sup>94</sup> or they may be enforced only when relief against the counterparty is limited to damages.<sup>95</sup>

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87. *Id.* at 936; *see also* *Pactiv Corp. v. Menasha Corp.*, 261 F. Supp. 2d 1009, 1014 (N.D. Ill. 2003) (refusing to enforce as overbroad a clause in nondisclosure agreement entered as part of exploring an acquisition).

88. *Pittsburgh Logistics*, 249 A.3d at 936.

89. *Id.*

90. *Id.* The court cited Donald J. Polden, *Restraints on Workers’ Wages and Mobility: No-Poach Agreements and the Antitrust Laws*, 59 SANTA CLARA L. REV. 579, 610 (2020), for the proposition that “worker wages are 4%–5% higher in states that do not recognize or enforce worker non-compete restraints.”

91. *Pittsburgh Logistics*, 249 A.3d at 936.

92. *Id.*

93. *Id.*

94. There is, of course, the possibility that such workers are themselves subject to a valid noncompete agreement, but that would usually be enforceable by enjoining them (in which case the no-poach agreement would largely be irrelevant except to add a deeper-pocket defendant for whatever damages might also be recoverable).

95. *Pittsburgh Logistics*, 249 A.3d at 936.

Neither the outcome nor the analysis of *Pittsburgh Logistics* is universally accepted.<sup>96</sup> The Pennsylvania court found the sparse authority elsewhere largely divided on the question.<sup>97</sup> It discussed three cases as supporting a public policy restriction and three as rejecting it.<sup>98</sup> Perhaps the most important authority against enforceability was the Wisconsin Supreme Court decision in *Heyde Cos. v. Dove Healthcare, LLC*,<sup>99</sup> which involved an arrangement under which the staffing agency agreed to place physical therapists at a healthcare facility; the agreement provided that the facility could not hire the plaintiff's employees without paying a fee.<sup>100</sup> The Wisconsin court looked to a state statute governing employee NCAs, which it viewed as applicable because an employer cannot "accomplish by indirection that which it cannot accomplish directly."<sup>101</sup> Under that statute, at least one requirement for a valid restraint was impossible to meet: the statute required that the agreement be necessary to protect the employer, and a no-poach agreement was not necessary when the employer could have contracted directly with its employees.<sup>102</sup> But the court piled on: the no-hire provision was "harsh and oppressive" to the employees because they had no knowledge of it nor had they agreed not to compete.<sup>103</sup> Further, the provision was contrary to public policy both

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96. There may, however, be a tendency to construe such agreements narrowly even when they are enforceable. *See* *Emergency Med. Care, Inc. v. Marion Mem'l Hosp.*, 94 F.3d 1059, 1062 (7th Cir. 1996) (finding that the hospital did not violate no switch agreement with the plaintiff firm that had contracted to provide emergency room services when it replaced it with another provider that in turn hired plaintiff's former employees).

97. *Pittsburgh Logistics*, 249 A.3d at 931–32.

98. *Id.*

99. 654 N.W.2d 830, 838 (Wis. 2002).

100. *Id.* at 832.

101. *Id.* at 834. The statute would not, by its express language, reach such an agreement. WIS. STAT. ANN. § 103.465 (2021) (barring an employee's covenant "not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal"); *see also* *Manitowoc Co. v. Lanning*, 906 N.W.2d 130, 139 (Wis. 2018) (applying the statute to a non-solicitation agreement).

102. *Heyde Cos.*, 654 N.W.2d at 835.

103. *Id.* at 836.

for that reason and because it violated “the fundamental right of a person to make choices about his or her own employment.”<sup>104</sup>

While *Heyde* can be distinguished as construing a particular statute, the *Pennsylvania Logistics* court cited two other decisions repeating the theme that employees should not be foreclosed from working for a new employer without their consent.<sup>105</sup> As suggested above, that problem could in one sense be addressed by denying injunctive relief to the plaintiff, but in another sense, rendering the defendant liable for damages would often effectively preclude employment by the defendant. Thus, such clauses can limit opportunities for workers without their knowledge or consent, but it is not always clear from these cases whether the agreement is in all respects invalid or permissible so long as the plaintiff does not seek an injunction foreclosing hiring of third parties.

In contrast, *Pittsburgh Logistics* discussed three cases that are more sympathetic to employers. *H & M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.*<sup>106</sup> was an Illinois decision upholding a labor supplier’s contract with a customer.<sup>107</sup> The drivers in question were H & M’s “sole business asset,” and it had a legitimate interest in retaining them.<sup>108</sup> While the agreement was a restraint of trade, the court held that such agreements are valid when they are not injurious to the public, do not cause undue hardship to the promisor, and are no greater than necessary to protect the promisee.<sup>109</sup> Applying those

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104. *Id.*; see also *Manitowoc Co.*, 906 N.W.2d at 145 (finding employer’s interest in recouping training costs it incurred for some workers did not justify “the sweeping restriction imposed by the plain language on Lanning’s non-solicitation of employees”).

105. *Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC*, 249 A.3d 918, 925–26 (Pa. 2021); *VL Sys., Inc. v. Unisen, Inc.*, 61 Cal. Rptr. 3d 818, 826 (Ct. App. 2007) (denying damages recovery: while not declaring all such agreements unenforceable, striking down “a broad provision” as applied to a person who never worked on plaintiff’s project with defendant on the ground that enforcement was “not necessary to protect VLS’s interests and is outweighed by the policy favoring freedom of mobility for employees”); *Tex. Shop Towel, Inc. v. Haire*, 246 S.W.2d 482, 484 (Tex. Civ. App. 1952) (affirming dismissal of a claim seeking both an injunction and damages: “[I]n a contract restricting trade, we do not think that an employee’s individual right and freedom to contract may be traded away by a third person, even by the third party’s express contract”).

106. 805 N.E.2d 1177 (Ill. 2004).

107. *Id.* at 1184.

108. *Id.*

109. *Id.* at 1183–84 (“This court has held that ‘in determining whether a restraint [on trade] is reasonable it is necessary to consider whether enforcement will be

principles, it found the agreement enforceable, dismissing harm to the employees as merely speculative on the record before it.<sup>110</sup> That was in part because an injunction was not at issue since the remedy sought was a \$15,000 liquidated damages clause for each employee hired, and therefore no employee was foreclosed from work.<sup>111</sup>

Two other cited cases are even more tolerant of such agreements. In *Therapy Services, Inc. v. Crystal City Nursing Center, Inc.*,<sup>112</sup> the Virginia Supreme Court upheld an agreement on facts similar to *Heyde*.<sup>113</sup> Again, the contract was in restraint of trade, but the plaintiff, as a supplier of workers, had “a legitimate interest in protecting its ability to maintain professional personnel in its employ.”<sup>114</sup> The fact that employees knew nothing about the restriction was “immaterial,” at least where the court believed that workers being foreclosed without knowledge and consent from one employment opportunity would not result in much harm when demand for their work in the area exceeded supply.<sup>115</sup>

Even less sympathetic to workers was *GeoDecisions v. Data Transfer Solutions, LLC*,<sup>116</sup> a federal district court decision that is now superseded by *Pittsburgh Logistics* as an interpretation of Pennsylvania law.<sup>117</sup> It involved two direct competitors in the information technology field who teamed up for a project and, as part of that collaboration,

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injurious to the public or cause undue hardship to the promisor, and whether the restraint imposed is greater than is necessary to protect the promisee.” (quoting *Bauer v. Sawyer*, 134 N.E.2d 329, 331 (Ill. 1956))).

110. Justice Thomas concurred but would have invalidated the restraint if the record had revealed that the provision was not disclosed to the employees. 805 N.E.2d at 1186. Justice Rarick dissented, arguing that stricter standards applied to employee restraints and those standards should be applied to the no-poach. *Id.* at 1186–87.

111. *Id.* at 1178, 1184 (noting that “employees are not unreasonably restricted or otherwise hurt by the no-hire clause in this contract”; while the provision renders some employees “potentially less desirable hires for Fox Valley because of the liquidated damages that would result from such a hire,” such harm is “merely speculative” and “[w]e are reluctant to deem a contractual provision an unreasonable or excessive restraint of trade on the basis of mere speculation of harm”).

112. 389 S.E.2d 710 (Va. 1990).

113. *Id.* at 712.

114. *Id.* at 711–12.

115. *Id.* at 712 (“The evidence indicated that in the Northern Virginia area, therapists were in low supply and in high demand and, thus, should they choose to leave Therapy Services’ employ, they could secure like positions in the area.”).

116. No. 10-CV-2180, 2010 WL 5014514, at \*11 (M.D. Pa. Dec. 3, 2010).

117. *Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC*, 249 A.3d 918, 934–35 (Pa. 2021).

agreed not to solicit each other's workers for two years.<sup>118</sup> Again stressing that the agreement was ancillary to the main purpose of a lawful transaction, the court found it necessary to protect the plaintiff's legitimate interest and reasonably limited to that end.<sup>119</sup> While the affected employees were unaware of the agreement, the court entered an injunction barring such employment while announcing sweepingly that "parties cannot avoid their contractual obligations by asserting a claim of hardship on behalf of a non-party."<sup>120</sup> That principle not only overstated the holding of the cited source<sup>121</sup> but is far too broad as a statement of normal equitable principles that take into account the effects of an injunction on innocent third parties.<sup>122</sup>

Although *Pittsburgh Logistics* by no means identified all the relevant authorities,<sup>123</sup> it did capture the main themes of the courts addressing these questions, and it did note that cases upholding no-poach

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118. *GeoDecisions*, 2010 WL 5014514, at \*1-2.

119. *Id.* at \*5, \*11.

120. *Id.* at \*10.

121. *Id.* The district court cited *Global Telesystems, Inc. v. KPNQwest, N.V.*, 151 F. Supp. 2d 478, 483 n.1 (S.D.N.Y. 2001), which did grant an injunction against hiring a particular worker but without announcing any grand principle. Even assuming the employee was without knowledge of the no-hire agreement, the court found that "sometimes in life, a person unfortunately walks through the wrong door. Such is the case here and I decline to allow KPNQ to avoid its obligations to GTS by asserting a claim of hardship to" the employee. *Id.*

122. The *Restatement (Second) of Contracts* so provides in § 364, which states that "(1) Specific performance or an injunction will be refused if such relief would be unfair because . . . (b) the relief would cause unreasonable hardship or loss to the party in breach or to third persons . . ." RESTATEMENT (SECOND) OF CONTRACTS § 364 (AM. L. INST. 1981). See *Standard & Poor's Corp. v. Commodity Exch., Inc.*, 683 F.2d 704, 712 (2d Cir. 1982) (taking into account the potential consequences of a preliminary injunction on third parties as a basis to deny such relief).

123. Compare *Freund v. E.D. & F. Man Int'l, Inc.*, 199 F.3d 382, 385 (7th Cir. 1999) ("We infer that under Illinois law an employer who has made a substantial enough investment in the human capital of its employees to enforce a covenant by his employees not to compete with him (for a reasonable time and within a reasonable geographical and product space) can also enforce a promise by another employer not to hire away these employees, provided the contract does not unreasonably restrain competition between the two employers . . ."), with *Hosp. Consultants, Inc. v. Potyka*, 531 S.W.2d 657, 664 (Tex. Civ. App. 1975) ("[W]here the restriction on B's freedom results, not from B's voluntary agreement with A, but from A's agreement with C, the difference in the situation and in the policy considerations to be balanced is obvious. In the one case B voluntarily relinquishes his freedom in order to obtain a benefit which, at the time of such relinquishment, he considered desirable. In the other situation B is deprived of his freedom without his acquiescence and with no resulting benefit to him.").

agreements sometimes use a different test for enforceability than the traditional requirements for employee NCAs.<sup>124</sup> For example, *Therapy Services* stressed that the no-poach was “neither a covenant not to compete nor a restrictive covenant between employer and employee”; rather, it was merely a “contract between two businesses” under which “one party agrees to forego the ability to hire certain people who are not parties to the contract”.<sup>125</sup>

As such, it is a contract in restraint of trade and will be held void as against public policy if it is unreasonable as between the parties or is injurious to the public. “Whether or not the restraint is reasonable is to be determined by considering whether it is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interest of the public.”<sup>126</sup>

*H & M* applied a similar test.<sup>127</sup>

Thus, the decisions agree that such restraints may or may not be enforceable, but they disagree as to whether the test for legality is that which applies to restraints in employer/employee agreements (although they may not appreciate what this might mean), or some arguably looser, and certainly vaguer, standard. For example, *Therapy Services* stresses “fair protection” as the purpose of the restraint, which might or might not map onto the “legitimate interest” requirement for NCAs.<sup>128</sup> And the requirement that the restraint “not [be] so large as to interfere with the interests of the public” might or might not track the requirements for a reasonable NCA.<sup>129</sup>

The two lines of analysis are likely to be in agreement that ancillary no-poach restraints may be permissible if, first, there exists a productive collaboration separate and apart from the restraint, and, second, the restraint is related to, maybe necessary for, that

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124. *Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC*, 249 A.3d 918, 931–32 (Pa. 2021).

125. *Therapy Servs., Inc. v. Crystal City Nursing Ctr., Inc.*, 389 S.E.2d 710, 711 (Va. 1990).

126. *Id.* (citing *Merriman v. Cover*, 51 S.E. 817, 819 (Va. 1905)).

127. *See supra* note 109; Daniel J. O’Brien, Note, *The Enforceability of No-Hire Provisions in Mergers, Acquisitions and Other Entrepreneurial Ventures*, 3 *ENTREPREN. BUS. L.J.* 113, 115 (2008) (viewing courts as divided among the “antitrust approach,” which focuses on “the big picture—how the enforcement of such provisions could potentially affect trade as a whole, as opposed to the effect on individuals” and the more recent approaches looking to state law governing contracts in restraint of trade).

128. 389 S.E.2d at 712.

129. *Merriman*, 51 S.E. at 819.

collaboration in the sense that it would not be undertaken if the restraint could not be employed.<sup>130</sup> The lines of authority disagree, assuming these conditions are met, as to how tailored the restraint must be to the needs of the collaboration. And they disagree as to the extent impact on third parties may influence the balance struck.

As to the former point, economic collaboration seems to parallel “legitimate interest” in terms of the *Restatement’s* standard for employee NCAs, and the “fair protection” test looks to how necessary the restraint is given the heightened access of each joint venturer to the employees of the other.<sup>131</sup> For example, as *Pittsburgh Logistics* suggests, a restraint barring employment of those with whom the new employer never worked during the collaboration is unconnected to such a purpose.<sup>132</sup> Likewise, a restraint that extends too long after the collaboration ends may also be invalid as greater than necessary to achieve the parties’ legitimate goals.<sup>133</sup> However, whether a court will

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130. In the antitrust context, this question has sometimes been phrased as whether there is a less restrictive alternative. The Supreme Court recently stated that “antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes,” but nevertheless upheld the lower court’s finding of a violation when it determined that plaintiffs “were able to show that the NCAA could achieve the procompetitive benefits it had established with substantially less restrictive restraints on education-related benefits.” *NCAA v. Alston*, 141 S. Ct. 2141, 2161–62 (2021).

131. RESTATEMENT OF EMP. L. § 8.08 (AM. L. INST. 2015); *Therapy Servs.*, 389 S.E.2d at 712.

132. *Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC*, 249 A.3d 918, 936 (Pa. 2021).

133. Some courts focus on the breath of the restraint as a factor in denying enforcement. *See Szabo Food Serv., Inc. v. Cty. of Cook*, 513 N.E.2d 875, 877 (Ill. App. Ct. 1987) (refusing to enforce an agreement which required not only that the County not hire plaintiff’s employee but also that County contractors not do so: No case “has come to our attention [that] validates a restrictive covenant which prevents two persons who are not parties to the contract which contains the covenant from entering into an employment contract”).

simply strike down an overbroad no-poach or apply some version of the blue pencil rule<sup>134</sup> applied to NCAs in most states is not clear.<sup>135</sup>

We will see shortly that transplanting NCA law generates more complications than the courts announcing it have appreciated, but for the moment let's focus on the judicial treatment of the most obvious difference between no-poach and traditional NCAs: the absence of consent and maybe even knowledge by the employees whose opportunities are being restricted. As we have seen, some decisions find the impact on nonconsenting employees fatal to enforceability or at least a basis to deny injunctive relief.<sup>136</sup> Even cases upholding restraints show some hesitancy about such third-party harm.<sup>137</sup> Others believe you can't make an omelet without breaking eggs, and such harm is ultimately irrelevant. Those courts would presumably issue an otherwise appropriate injunction even if it meant termination of employment for an identifiable person.

In the middle may be courts who would withhold an injunction while enforcing the contract to the extent it provided for a fee or liquidated damages for a violation. While *Pittsburgh Logistics* seems to rule out an injunction, it is not clear if a damages remedy would be available if the

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134. See *Ferrofluidics Corp. v. Advanced Vacuum Components*, 968 F.2d 1463, 1469 (1st Cir. 1992) ("Courts presented with restrictive covenants containing unenforceable provisions have taken three approaches: (1) the 'all or nothing' approach, which would void the restrictive covenant entirely if any part is unenforceable, (2) the 'blue pencil' approach, which enables the court to enforce the reasonable terms provided the covenant remains grammatically coherent once its unreasonable provisions are excised, and (3) the 'partial enforcement' approach, which reforms and enforces the restrictive covenant to the extent it is reasonable, unless the 'circumstances indicate bad faith or deliberate overreaching' on the part of the employer."). The *in terrorem* effects of excessive restraints have been noted, see *Team Env't Servs. v. Addison*, 2 F.3d 124, 127 (5th Cir. 1993), and approaches (2) and (3) provide minimal disincentives for employer overreaching. The *Restatement of Employment Law* would allow invalidation of overbroad covenants if "the employer lacked a reasonable and good-faith basis for believing the covenant was enforceable," and "gross overbreadth alone" permits such finding. RESTATEMENT OF EMP. L. § 8.08. See generally Charles A. Sullivan, *Tending the Garden: Restricting Competition via "Garden Leave"*, 37 BERKELEY J. EMP. & LAB. L. 293, 307–08 (2016); Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1151 (2009); Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 967.

135. See *Pactiv Corp. v. Menasha Corp.*, 261 F. Supp. 2d 1009, 1016 (N.D. Ill. 2003) (refusing to blue pencil an overbroad restraint). See generally Basanta, *supra* note 33, beginning circa 492 n.214.

136. See discussion *supra* note 103.

137. See discussion *supra* notes 106–11.

restraint were otherwise tailored to the legitimate interest.<sup>138</sup> Such a result might be framed in terms of a partial public policy override or simply the outcome of a traditional equitable balancing of interests, or perhaps even the practical complications of multi-party litigation.<sup>139</sup> Regardless, the economic incentives for no-poach agreements would remain largely in place, with consequent dampening effects on employee mobility even though particular individuals would be permitted to work for the new employer.<sup>140</sup> And those wishing to utilize no-poach agreements may well be able to provide for fees or liquidated damages<sup>141</sup> high enough to effectively preclude such hiring.<sup>142</sup>

The *Restatement of Employment Law* throws little light on these questions.<sup>143</sup> It does not explicitly deal with no-poach agreements, and the only provision arguably applicable would seem to permit them.<sup>144</sup> Thus, § 603(a) deals with the torts of intentional interference with contract or prospective advantage. The blackletter provides:

An employer wrongfully interferes with an employee's employment or prospective employment with another employer when the employer, by improper means or without a legitimate business interest, intentionally causes another employer (i) to terminate its employment of the employee; or (ii) not to enter into an employment relationship with the employee.<sup>145</sup>

It is not clear that the language is meant to apply to an *ex ante* no-poach binding the counterparty from "enter[ing] into an employment

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138. *Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC*, 249 A.3d 918, 934 (Pa. 2021).

139. See discussion in text beginning *infra* note 175.

140. See *VL Sys., Inc. v. Unisen, Inc.*, 61 Cal. Rptr. 3d 818, 824 (Ct. App. 2007) (enforcing a liquidated damages clause for \$60,000 "would present many of the same problems as covenants not to compete and unfairly limit the mobility of an employee").

141. See discussion in text beginning *infra* note 150.

142. See *Asta, L.L.C. v. Telezygology, Inc.*, 629 F. Supp. 2d 837, 848 (N.D. Ill. 2009) (upholding an agreement to pay 50% of employee's base salary upon hire, even when the employee was soon discharged).

143. Nor does the draft ULC uniform law. See *supra* note 2. That may be because they are not "employment" laws in the sense that employees are on one side of the transaction and may need more protection than contract law usually provides. Still, this Article demonstrates that employees can be seriously affected by no-poach agreements and justifications for legal intervention may well extend to them for that reason.

144. RESTATEMENT OF EMP. L. § 6.03(a) (AM. L. INST. 2015).

145. *Id.*

relationship with the employee.”<sup>146</sup> But even if so, and even assuming all other conditions of the tort are met,<sup>147</sup> a finding of “improper means” seems unlikely,<sup>148</sup> and meeting the ancillarity prong would normally seem to satisfy the “legitimate business justification” requirement.<sup>149</sup>

In short, the law on no-poach agreements is both scanty and confused.

### III. REMEDIAL CHALLENGES

Even assuming a no-poach agreement is enforceable to begin with, it poses serious remedial problems, problems that have not always been well-analyzed in the cases. Contract breaches, of course, are addressed

146. *Id.*

147. These include the existence of “a contractual or prospective contractual or other business relationship between the plaintiff and a third party” and the defendant’s awareness of this relationship. *Id.* § 6.03 cmt. b. It is not clear that the drafters had in mind the mere possibility that the counterparty would, but for the no-poach agreement, offer employment to one or more unidentified individuals in the future.

148. *Id.* § 6.03(a); *see* *Ixchel Pharma, L.L.C. v. Biogen, Inc.*, 470 P.3d 571, 580 (Cal. 2020) (holding that “to state a claim for interference with an at-will contract by a third party, the plaintiff must allege that the defendant engaged in an independently wrongful act”).

One possible improper means would seem to be failure to disclose such agreements to its workers, but the *Restatement* would not view that as wrongful. Affirmative misrepresentations can be actionable. *See* § 6.05 (imposing liability for “intentionally inducing a current or prospective employee, through a knowingly false representation of fact, current intent, opinion, or law” to either “(a) to enter into, maintain, or leave an employment relationship with the employer” or “(b) to refrain from entering into or maintaining an employment relationship with another employer”); *see also* § 6.06(a) (dealing with “negligent provision of false information to employees,” but only where the misinformation is that on which “that the employee may reasonably rely on in deciding whether to enter into or maintain an employment relationship”). But the *Restatement* rarely imposes a duty to speak on employers. Comment c explicitly provides that “[a]n employer does not have a general duty to disclose information about its business to current or prospective employees, even if that information might be material to the employment decision.” § 6.05 cmt. c.; *see also* *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM* § 13 (AM. L. INST. 2020) (imposing a duty to disclose in certain situations, none of which would seem to reach an employer’s failure to inform its workers of a no-poach agreement given current business practices).

149. For the *Restatement*, examples of such justifications include “competition with other employers and anticipated business benefits from other employers, as when multiple employers exchange information about their employees” but not “a desire to retaliate against an employee out of spite or vindictiveness when the employer’s actions serve no legitimate business purpose.” *RESTATEMENT OF EMP. L.* § 6.03 cmt. b.

by two distinct kinds of remedies, damages and equitable relief, and each poses problems for these agreements.

A. *Damages*

It will rarely be possible for an employer to prove substantial damages caused by breach of a no-poach agreement. The model for such damages would, presumably, be the recovery the employer would have had if the employee breached.<sup>150</sup> But, of course, an at-will worker's departure is not a breach to begin with. Presumably, then, the law would look to the damages such an employer may recover from an employee who breached her durational contract, as adjusted by the possibility that the employee would have left in any event since, by definition, she is mobile.

The general damages for an employee's breach of a durational contract is the marginal cost of hiring a replacement for the remaining term of the contract.<sup>151</sup> Since employers can typically replace workers at or near their current compensation, that number is likely to be small or zero.<sup>152</sup> Although consequential damages and costs of mitigation (such as paying a headhunter) may theoretically add to the recovery,<sup>153</sup> the prospect of a meaningful judgment remains small, which may explain why we see so few cases of employers suing breaching

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150. The *Restatement of Employment Law* is very restrictive as to employee liability, even for breach of a durational contract. Its default is a presumption of no employee liability since the employer's remedy of discharge is sufficient. *Id.* § 9.07 cmt. b. It does permit damages where "the employment agreement clearly states [there] is a basis for damages liability is subject to liability for that breach of contract." § 9.07(a); *see id.* § 9.07 Illus. 1-4. While in such cases, "[t]he employer may recover damages for foreseeable economic loss that the employer could not have reasonably avoided, including any reasonably foreseeable consequential damages and the expenses of reasonable efforts to mitigate damages." *Id.* § 9.07. Such "economic loss" does not normally include lost profits. *Id.* § 9.07(b) ("Economic loss under subsection (a) does not include lost profits caused by the employee's breach unless the agreement expressly provides for such recovery or the employee knew or should have known that the employee would be held responsible for lost profits caused by the employee's breach.").

151. *Handicapped Child.'s Educ. Bd. v. Lukaszewski*, 332 N.W.2d 774, 778 (Wis. 1983); *Med + Plus Neck & Back Pain Ctr. v. Noffsinger*, 726 N.E.2d 687, 692 (Ill. App. Ct. 2000).

152. *Lukaszewski*, 332 N.W.2d at 779.

153. In theory, employers might also seek to recoup the cost of training, which they expected to recover over the life of the contract. In practice, employers seek to protect their training costs by specific provisions specifying declining repayment obligations the sooner an employee departs.

employees.<sup>154</sup> And for no-poach agreements applied to at-will workers (the scenario in which such an agreement is most useful), the number has to be further discounted by the possibility that the employee would have left in any event.

No-poach agreements often deal with this problem by providing for an amount denominated “liquidated damages” for breach for each such hire.<sup>155</sup> However, the law has historically viewed liquidated damages clauses, unlike most other contractual terms, as subject to judicial policing. The *Restatement (Second) of Contracts* sets forth the conventional view in section 356(1):

Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.<sup>156</sup>

The rule is applied to employee NCAs with mixed results.<sup>157</sup> In the no-poach setting, however, clauses stipulating substantial amounts of recovery may be more likely to fall afoul of this provision given that the wronged party’s “anticipated or actual loss” (as measured above) is likely to be small.<sup>158</sup>

Perhaps in an effort to avoid this risk, no-hire agreements often provide for a “fee,” usually denominated a “conversion fee,” in the case of a hire.<sup>159</sup> This might be viewed as simply another name for a

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154. See generally Stewart E. Sterk, *Restraints on the Alienation of Human Capital*, 79 VA. L. REV. 383, 389 (1993). There is the further possibility that any judgment obtained will be uncollectible, less of a risk in the typical no-hire setting where the suit is against another employer.

155. Zoe Salzman, *Liquidated Damages Clauses in Employment Agreements*, 34 A.B.A.J. LAB. & EMP. L. 239, 239–40 (2020).

156. RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (AM. L. INST. 1981).

157. Compare *Kent State Univ. v. Ford*, 26 N.E.3d 868, 876–77 (Ohio App. 2015) (enforcing a liquidated damages clause in a coach’s contract), with *Gwinnett Clinic, Ltd. v. Boaten*, 798 S.E.2d 110, 114 (Ga. App. 2017) (refusing to enforce such a clause in a physician’s contract); *Willard Packaging Co. v. Javier*, 899 A.2d 940, 955 (Md. Ct. Spec. App. 2006) (refusing to enforce such a clause in salesman’s contract); cf. *Am. Consulting Env’t Safety Servs., Inc. v. Schuck*, 888 N.E.2d 874 (Ind. Ct. App. 2008) (unpublished table decision), 2008 WL 2346154, at \*3 (refusing to enforce a clause providing for repayment of training costs on the ground that the repayment amount stipulated in the parties’ contract was disproportionate to the employer’s actual loss).

158. RESTATEMENT (SECOND) OF CONTRACTS § 356(1).

159. Flanagan, *supra* note 14, at 256 (“Rather than framing these provisions as liquidated damages for breach of a no-hire or non-solicit clause, many of the contracts

liquidated damages clause and therefore subject to that analysis. But another paradigm is to view the contract as providing for two alternative methods of performance:<sup>160</sup> either “lease” the worker on a continuing basis or “buy” her for a one-time fee. In other words, if a contract between A and B bars A from hiring B’s employees, such hire would be a breach, and a clause specifying the amount due would seem to be subject to the rules governing liquidated damages. If, on the other hand, the no-poach agreement does not bar the hiring but simply imposes a fee in that event, the provision should arguably be viewed as any other contractual commitment.<sup>161</sup>

The law has historically had difficulty distinguishing between liquidated damages clauses and alternative modes of performance.<sup>162</sup> If a clause is found to be the latter, there is no reasonableness override, as is true of almost all contract terms.<sup>163</sup> But the catch is that deciding whether a particular clause is “really” a liquidated damages provision or “really” provides for alternative performance brings into play much the same considerations as deciding whether a liquidated damages clause is reasonable since the test is whether “the parties intended the

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I reviewed established a ‘conversion’ fee schedule that applied in the event that the worksite employer wanted to hire or ‘convert’ the temporary worker to a direct employee. Often these fees were the highest within the first few month(s) of an assignment - 20% to 30% of an employee’s annualized salary within the first 60 days of work was common - and then the percentage of the fee would decline over time.”).

160. See Basanta *supra* note 33, beginning circa 488 n.184.

161. RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. c (“Sometimes parties attempt to disguise a provision for a penalty by using language that purports to make payment of the amount an alternative performance under the contract, that purports to offer a discount for prompt performance, or that purports to place a valuation on property to be delivered. Although the parties may in good faith contract for alternative performances and fix discounts or valuations, a court will look to the substance of the agreement to determine whether this is the case or whether the parties have attempted to disguise a provision for a penalty that is unenforceable under this section. In determining whether a contract is one for alternative performances, the relative value of the alternatives may be decisive.”); see also RESTATEMENT (SECOND) OF CONTRACTS § 361 cmt. b (permitting specific performance when a “true alternative performance” is “not forthcoming”; “[b]ut if the obligor chooses to pay the price, equitable relief will not be granted”).

162. See Seana Valentine Shiffirin, *Remedial Clauses: The Overprivatization of Private Law*, 67 HASTINGS L.J. 407, 412 n.18 (2016).

163. See generally *id.* at 411, 413.

options to give the promisor a real choice between reasonably equivalent choices.”<sup>164</sup>

### *B. Equitable Relief*

An alternative remedy to damages is equitable relief barring the breaching party from employing plaintiff’s workers in violation of the no-hire agreement. The initial objection to such relief is the standard requirement that the damage remedy at law be “inadequate.”<sup>165</sup> Although the adequacy requirement has been declared dead,<sup>166</sup> courts continue to require some such showing, which may often pose problems for the plaintiff.<sup>167</sup> Whatever “adequacy” might mean, a showing that recovery would be small is not sufficient since adequacy is measured by what the law would allow, not the plaintiff’s subjective aspirations.<sup>168</sup> However, let’s assume that damages are inadequate because, though likely to be real, they are not sufficiently certain to be recoverable perhaps because of the absence of proof of how long the employee would have remained with the plaintiff had the defendant not hired her.

Still, there are obvious problems with such relief. No-poach agreements by definition affect not only the immediate parties to the agreement (the employers in question) but also nonparties (the employees who may not be hired or will be terminated should the agreement be enforced).<sup>169</sup> The resulting three-sided relationship creates some complications for the law, substantively and procedurally.

Substantively, the existence of a contract between two parties does not prevent one from entering into an inconsistent contract with a

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164. Jennifer S. Martin, *Opportunistic Resales and the Uniform Commercial Code*, 2016 U. ILL. L. REV. 487, 522.

165. See generally Kathleen Carrick, *Regulating Rehabilitation*, 74 L. LIBR. J. 557, 593, 599.

166. DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 22–23 (1991).

167. See generally Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990) [hereinafter *Laycock Article*].

168. See *id.* at 691.

169. See generally Donald J. Polden, *Restraints on Workers’ Wages and Mobility: No-Poach Agreements and the Antitrust Laws*, 59 SANTA CLARA L. REV. 579, 583–86 (2020) (discussing no-poach agreements in the tech industry).

nonparty,<sup>170</sup> at least absent the third party's knowledge.<sup>171</sup> Similarly, procedurally, even a court order cannot bind a nonparty.<sup>172</sup> Thus, the fact that B promised A not to employ C and simultaneously promised C to employ her does not mean that both contracts are not valid. Even a court judgment in a case between A and B would not bind C. Thus, C might well have a valid claim against B despite any finding in the A <> B suit regarding C or the priority of A or C's rights.

As applied to no-poaching agreements, neither the employer seeking enforcement of its no-hire clause nor the employee seeking enforcement of any contract is foreclosed from suit.<sup>173</sup> Nevertheless, the existence of third-party claims might mean that specific performance should not be granted either to C (not a normal contract remedy in any event)<sup>174</sup> nor should an injunction be granted to A that would require B to not hire C. And that might apply regardless of whether C has a durational contract claim or merely an expectation of

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170. See *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 758, 767 (1983) (court order enforcing arbitration award did not bar enforcement of conflicting collective bargaining agreement when it remained possible for the defendant to comply with both; the company's plight was "of the Company's own making. The Company committed itself voluntarily to two conflicting contractual obligations").

171. Were C to know of the A <> B contract, its entering into a contract with B might constitute intentional interference by C with that contract. Cf. RESTATEMENT OF EMP. L. § 6.03 cmt. b (AM. L. INST. 2015) (summarizing the elements of the tort of intentional interference as including "(1) a contractual or prospective contractual or other business relationship between the plaintiff and a third party exists; (2) the defendant is aware of this relationship; (3) the defendant acts with the intent to cause an interference with that relationship or prospective relationship; (4) the defendant's acts cause interference; (5) the interference results in reasonably foreseeable damages to the plaintiff; and (6) the defendant's acts are 'improper,' or in the language of some decisions, not 'justified' or not 'privileged.' . . . [I]ntentional interference with a business relationship includes interference that the actor knows is certain or substantially certain to result from the action.").

172. See *W.R. Grace & Co.*, 461 U.S. at 758.

173. *Id.*; see *supra* note 170 (discussing a court order to enforce arbitration award's relationship to collective bargaining agreements); *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (consent decree did not immunize parties from so-called "collateral" attack by nonparties, who were not required to intervene in the original action to raise legal challenges). See generally Andrea Catania & Charles A. Sullivan, *Judging Judgments: The 1991 Civil Rights Act and the Lingering Ghost of Martin v. Wilks*, 57 BROOK. L. REV. 995, 1000-01 (1992).

174. See RESTATEMENT OF EMP. L. § 9.04(a) ("Except as otherwise provided by law, an employer's agreement, promise, or statement that it will hire or continue to employ an employee or job applicant will not be specifically enforced.").

employment. This reality may explain the hesitancy of some of the decisions to provide injunctive relief for breach of a no-poach.

In any event, procedurally, both A and C almost certainly have a right to intervene in a suit brought by the other against B.<sup>175</sup> Further, while each can probably be joined in any suit commenced by the other, the possibility of inconsistent judgments is probably remote enough that the suit can go forward without the additional party.<sup>176</sup> This would seem certainly true when the worker is employed at will by B and therefore has no “right” to continued employment; while C retains an “interest” sufficient to justify intervention, the possibility of inconsistent judgments, a standard reason for requiring joinder, is remote. It is a closer question whether a worker with a durational contract must be joined when an injunction is sought barring her employment, but there is no necessary inconsistency between an order to B not to hire C and a damage suit by C against B for its breach of a durational contract.

#### IV. ANOTHER LOOK

Any assessment of the law’s proper approach to no-poach agreements has to begin by recognizing that they are both better and worse than traditional NCAs in terms of employee mobility. “Better” in the sense that even broad provisions foreclose competition in the labor market for only one potential competitor (although the foreclosed firm might well be the most likely alternative employer in a given market).<sup>177</sup> They may also be innocuous if the covered employees have signed enforceable NCAs. Further, some restraints, especially small conversion fees, may not really have much effect even on that

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175. Fed. R. Civ. P. 24(a); *see also* Fed. R. Civ. P. 24(b).

176. Fed. R. Civ. P. 19; *see* *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1472 (1st Cir. 1992) (“[I]t is generally recognized that a person does not become indispensable to an action to determine rights under a contract simply because that person’s rights or obligations under an entirely separate contract will be affected by the result of the action.” (quoting *Helzberg’s Diamond Shops, Inc. v. Valley West Des Moines Shopping Ctr., Inc.*, 564 F.2d 816, 820 (8th Cir. 1977))).

177. *Basanta*, *supra* note 33, at 477 (“[W]hen compared to the usual covenant-not-to-compete in an employment contract, a no-hire clause will often be arguably *less* burdensome to the employee. A covenant-not-to-compete will usually bar the former employee from *any* employment or other relationship with *any* competitor of the employer in a defined geographic area for a stated duration. In contrast, a no-hire clause only applies to employment with a specific employer (or group of employers), leaving the employee with a broader range of remaining employment opportunities in the area.”).

competition. “Worse” in the sense that the employees whose opportunities are curtailed typically have no say in the matter.<sup>178</sup> Thus, employee autonomy arguments for permitting such restraints are absent. Further, the restraint may exceed in time and space what a reasonable NCA could impose, and the foreclosed employer may well be the most attractive opportunity and, sometimes at least, the only game in town.

This may explain the split in authority between the courts that claim to approach such agreements as they would NCAs and the courts that purport to apply an apparently looser test. But any sharp division between the lines of authority is blurred by the facts: first, that transplanting the traditional test requires, as we will see, considerable adjustment and, second, that the alternative approach is so vague as to permit similar results to traditional analysis. In short, current doctrine is not especially helpful.

Any evaluation must begin, as several of the cases above suggest, with the core difference between a garden-variety NCA and a no-poach agreement: affected employees may not be informed of the existence of the latter, much less asked to consent.<sup>179</sup> But whether the effects on third parties should render the agreements unenforceable (or perhaps enforceable only for damages)<sup>180</sup> is another question.

On the one hand, a number of opinions express the judicial intuition that foreclosing third party employees is more problematic than a traditional NCA.<sup>181</sup> Even Judge Posner, not known for being swayed by emotional appeals, colorfully recognized that difference by striking down an arrangement that would require the discharge of employees who were not parties:

The situation was thus that one employee obtained a contract whereby fellow employees would lose their jobs if he lost his. It was the commercial equivalent of the discredited Hindu practice of suttee, whereby the widow is required to immolate herself on her husband’s funeral bier. If Freund went, Walter and Mueller had to go too. And unlike the case of suttee, Walter and Mueller were not aware that they were “married” to Freund.<sup>182</sup>

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178. *But see id.* at 478 (observing some courts assume the employee bargains for and agrees to the noncompetition arrangement).

179. *See* discussion in text beginning *infra* note 213.

180. *See* discussion in text beginning *supra* note 166.

181. *Freund v. E.D. & F. Man Int’l, Inc.*, 199 F.3d 382, 385 (7th Cir. 1999).

182. *Id.*

On the other hand, however, some courts distinguish between firing (not permitted) and not hiring (permitted).<sup>183</sup>

And it is true that the law does not generally bar contracts between consenting parties<sup>184</sup> merely because such agreements foreclose opportunities for others.<sup>185</sup> Indeed, the typical NCA can be said to do exactly that—foreclose options for a nonparty (the potential alternative employer)—and that has never been a basis to deny enforcement.<sup>186</sup> Similarly, firms often enter into exclusive agreements with leasing firms to provide them with workers,<sup>187</sup> and, by and large, such agreements have been upheld by the courts.<sup>188</sup> This is true even in California, which has the most robust protection against restraints on competition.<sup>189</sup> More broadly, every contract can be said to foreclose dealing with nonparties to the extent of the contractual commitment.<sup>190</sup>

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183. *H & M Com. Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 805 N.E.2d 1177, 1190 (Ill. 2004) (Rarick, J., dissenting) (agreeing with *Freund*, as to agreements requiring discharging workers while finding a no-poach enforceable to the extent it merely barred hiring them).

184. Even in the antitrust cases, legality often turns on whether there is substantial foreclosure in the relevant market, as assessed by a number of factors. 1 JULIAN O. VON KALINOWSKI ET AL., *ANTITRUST LAWS AND TRADE REGULATION* § 23.02 (2d ed. 2021). Traditionally, this has been applied to product or service markets, but not to labor markets. *See supra* note 9.

185. *See Freund*, 199 F.3d at 384 (recognizing that “[a]t first glance it may seem bizarre indeed to seek to hold a person to a contract to which he was not a party and of which he had no knowledge,” but finding that not a barrier to enforcement when identified individuals would not be legally bound by the contract; that is true even if such a decision would set “a precedent the practical effect of which will be to bind any future [employees] much as if they were defendants; but that is also a possible effect of legal doctrines that no one would question,” such as “conventional tort[s]” like intentional interference with contract).

186. *See, e.g., CDI Eng’g Grp., Inc. v. Admin. Exch., Inc.*, 222 S.W.3d 544, 548–49 (Tex. App. 2007).

187. *E.g., id.* at 546 (litigation over who would supply nontechnical workers to employer).

188. *See, e.g., Mateo-Woodburn v. Fresno Cmty. Hosp. & Med. Ctr.*, 270 Cal. Rptr. 894, 901, 905 (Ct. App. 1990) (approving hospital’s exclusive contract with providers of anesthesiology services).

189. *See infra* note 219.

190. Basanta, *supra* note 33, at 477 (“[A]lmost any contract will have an impact on third parties who have not agreed to its terms. An exclusive provider agreement between a hospital and a clinical service provider, by definition, impacts directly the opportunities of other providers who are not parties to the agreement and have not assented to it. Yet, current law does not hold that all such agreements violate public policy.”); *see also* Bryan A. Liang, *An Overview and Analysis of Challenges to Medical*

Nevertheless, no-poach agreements do restrict competition, and that has long been a basis for subjecting NCAs to heightened scrutiny as compared to other contracts.<sup>191</sup> The standard justification has been third-party effects (usually framed in terms of harm to the public), but protection of employees' right to practice their profession or trade has always been a necessary result and sometimes an explicit part of the analysis.<sup>192</sup> In other words, while not per se illegal when the ancillary requirement is met, the mere fact that the parties agree to traditional NCAs is not the end of judicial inquiry.<sup>193</sup> There is a further requirement of "reasonableness" under a structured analysis whose origins reach back for centuries.<sup>194</sup> Many courts are prepared to take some version of that approach to no-poach agreements, and the law's general reliance on the *free* market would seem to justify judicial skepticism: what makes such a market "free" is the absence of unnecessary restraints on competition.

However, the transplantation of NCA principles to the no-poach context is more problematic than the courts seem to think. At the broadest level, we might accept balancing the economic gain of collaborations enabled thereby against the curtailment of labor market competition, but closer to the ground, the transplant seems ill-adapted. Recall that *Pittsburgh Logistics Systems, Inc. v. Beemac Trucking, LLC*,<sup>195</sup> applied Pennsylvania law on restrictive covenants between employers and employees to an agreement between two employers, and it found the *Restatement (Second) of Contracts* to state the correct analysis.<sup>196</sup> That, in turn, requires that the restraint (1) be ancillary to a legitimate interest,<sup>197</sup> (2) be reasonably tailored to that interest, and (3) strike the right balance between the employer's interest and harm to other contractual parties and the public.<sup>198</sup>

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*Exclusive Contracts*, 18 J. LEGAL MED. 1, 4–5 (1997) (exploring various legal challenges to exclusive arrangements between hospitals and practice groups).

191. See generally, Basanta, *supra* note 33, at 478 & n.152 (discussing the heightened scrutiny applied to noncompetes as compared to covenants in other contexts and citing cases).

192. Sullivan, *Downsizing*, *supra* note 1, at 705–06.

193. *Id.* at 708.

194. See *id.* at 693, 706.

195. 249 A.3d 918 (Pa. 2021).

196. *Id.* at 919.

197. RESTATEMENT (SECOND) OF CONTRACTS § 187 (AM. L. INST. 1981).

198. See *id.* § 188; *supra* note 83.

As for the first step, *Pittsburgh Logistics* saw preservation of the employer's workforce from raiding by its contracting party as legitimate in the case before it but did not go further to announce what other interests would be sufficient.<sup>199</sup> Looking to the *Restatement* provides little guidance in the no-poach setting since NCA law simply was not designed for the no-poach context, and most of the listed legitimate interests are inapt.<sup>200</sup> As our canvass of the use of such agreements indicates, a wide range of business reasons underlie such restraints, not all of which may be viewed as legitimate. For example, clauses seeking to prevent intra-franchise competition for employees may be seen as too remote from the needed collaboration and merely an effort to dampen competition in the labor market. It might be, therefore, that such restraints will fail at step one.<sup>201</sup>

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199. *Pittsburgh Logistics Sys., Inc.*, 249 A.3d at 936; *see also* *Freund v. E.D. & F. Man Int'l, Inc.*, 199 F.3d 382, 386 (7th Cir. 1999) (acquiring a business under an arrangement by which the owner would be paid deferred compensation, might justify a no-poach to prevent opportunistic conduct by the buyer).

200. The *Restatement (Second) of Contracts* speaks broadly of "restraints that are ancillary to a valid transaction or relationship" and lists three as "include[ing] the following:

- (a) a promise by the seller of a business not to compete with the buyer in such a way as to injure the value of the business sold;
- (b) a promise by an employee or other agent not to compete with his employer or other principal;
- (c) a promise by a partner not to compete with the partnership.

RESTATEMENT (SECOND) OF CONTRACTS § 188(2). Presumably, however, the courts are free to recognize other valid relationships. The *Restatement of Employment Law* is arguably more restrictive:

- (a) A restrictive covenant is enforceable *only if* the employer can demonstrate that the covenant furthers a legitimate interest of the employer.
- (b) An employer has a legitimate interest in protecting, by means of a reasonably tailored restrictive covenant with its employee, the employer's:
  - (1) trade secrets, as defined in § 8.02, and other protectable confidential information that does not meet the definition of trade secret;
  - (2) customer relationships;
  - (3) investment in the employee's reputation in the market; or
  - (4) purchase of a business owned by the employee.

RESTATEMENT OF EMP. L. § 8.07 (AM. L. INST. 2015) (emphasis added). Paragraph (b), however, does not explicitly state it is exhaustive.

201. *See* *Deslandes v. McDonald's USA, LLC*, No. 17 C 4857, 2018 U.S. Dist. LEXIS 105260, at \*20 (N.D. Ill. June 25, 2018) (finding antitrust claim stated and noting that "[t]he very fact that McDonald's has managed to continue signing franchise agreements even after it stopped including the provision in 2017 suggests that the no-hire provision was not necessary to encourage franchisees to sign").

The second step is to decide whether the restraint is “greater than is needed to protect the promisee’s legitimate interest.”<sup>202</sup> Where such an interest is protection of customers or confidential information in the NCA context, the courts routinely decide whether the time-and-distance parameters of the restricted area strike an appropriate balance.<sup>203</sup> But things get stickier with a no-poach. Start with the franchise example. Such agreements often restrict hiring during the term of the franchise agreement, and such agreements, while typically anticipating a long-term relationship between franchisor and franchisee, are nevertheless often terminable by the franchisor in relatively short periods of time, even in the absence of franchisee breach.<sup>204</sup> Should the court look to the parties’ actual expectations or the stated duration of the contract? Or perhaps the “average” duration? If that is decades, is the restraint thereby temporally unreasonable?

Both in and outside of the franchise setting, temporal reasonableness is problematic for another reason. In the NCA context, courts generally uphold otherwise reasonable restraints ranging from six months to two years after termination of employment.<sup>205</sup> But no-

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This perception may explain the Washington State prohibition on no-poaches in the franchise context:

(1) No franchisor may restrict, restrain, or prohibit in any way a franchisee from soliciting or hiring any employee of a franchisee of the same franchisor.

(2) No franchisor may restrict, restrain, or prohibit in any way a franchisee from soliciting or hiring any employee of the franchisor.

2019 Wash Sess. Laws ch. 299.

202. *Pittsburgh Logistics*, 249 A.3d at 935 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 188(a)).

203. See generally *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 738, 741 (5th Cir. 2005).

204. Franchise law is an amalgam of state common law, state general commercial statutes, and state and federal regulation, making it difficult to generalize about termination decisions. See 6 CORBIN ON CONTRACTS § 26.14 (2021) (“Franchises have become heavily regulated, under a Federal Trade Commission Franchise Rule, by industry-specific statutes like the Automobile Dealers’ Day in Court Act of 1956, and the Petroleum Marketing Practices Act of 1978, and under general state dealership laws. Many of these regulations specify what must be disclosed to prospective franchisees, and most provide that the franchisor must act in good faith.” (footnotes omitted)); see also Hafiz, *supra* note 55.

205. *Philips Elecs. N. Am. Corp. v. Hope*, 631 F. Supp. 2d 705 (M.D.N.C. 2009). Recent legislative restrictions on NCAs also reflect this kind of range. See Sullivan, *Downsizing*, *supra* note 1, at 681–82 (discussing legislative efforts taken by California, the District of Columbia, Oklahoma, Hawaii, Idaho, and Massachusetts).

poach agreements sometimes measure the restraint only in terms of the relationship between the two firms when they should also look to the length of employment of the workers in question. Thus, a restraint may run for a year from the termination of that relationship, which (given renewals of contracts) may be long after the worker has ceased her employment.<sup>206</sup> This suggests that the time dimension should be measured both from the point where the employee leaves the client firm as well as the length of the no-poach agreement itself, in order to determine whether it is excessive.

Further, consider a labor supplier and assume that protecting its “inventory” of workers is a legitimate interest. Are its workers analogous to a firm’s customer list (a legitimate interest for NCA purposes)?<sup>207</sup> At first glance, that seems plausible, but reasonable protection of customers is usually conceived of in terms of providing the former employer an opportunity to show those customers that it remains capable of providing quality service despite the loss of the former worker. That is not only inapplicable in the no-poach setting but actually backwards: the employee (viewed as a customer) is already working for the employer and has an opportunity to negotiate a better deal for staying if approached by another employer.

Rather, the “reasonableness” balance would seem to be struck in terms of the amount of any liquidated damages clause or conversion fee, but the obvious threshold question is how a court begins to think about the issues. Normally, we simply let the market decide such questions but, by definition, market forces are being distorted by the contract at issue.<sup>208</sup> The economics of such arrangements generally have the labor provider recover its investment in its worker inventory in the difference between what it is paid by the worksite employer and what it pays its worker.<sup>209</sup> But there is often not much of an investment

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206. See Flanagan, *supra* note 14, at 254–55, 258 (citing a renewable staffing services contract that could result in an assigned worker being barred from being hired for years after he had actually worked on the site).

207. See Robert J. Orelup & Christopher D. Drewry, *Judicial Review and Reformation of Noncompete Agreements*, 29 CONSTR. LAW. 29, 37 (2009) [hereinafter Orelup] (discussing Maryland’s general rule regarding customer lists and the impact on a noncompete agreement).

208. See Sullivan, *Downsizing*, *supra* note 1, at 704–05 (recognizing the reasonableness analysis seeks to balance the inherent tension between private market corrections and NCAs’ tendency to distort competitive markets).

209. See Flanagan, *supra* note 14, at 248 (providing background on agency markups for temporary employees).

in any individual worker—the worksite employer provides any job-specific training needed. So, is the question what is a fair return? And is that measured by trade practices? Or the costs of the arrangement? These are, obviously, not questions courts are comfortable with addressing but seem inevitable if the step two issue is the reasonableness of the restraint.

Then there is step three. Recall that, in the traditional NCA context, that asks whether “the promisee’s need is outweighed by the hardship to the promisor and the likely injury to the public.”<sup>210</sup> How this might apply to a no-poach agreement is not obvious. “Injury to the public” in the NCA context is rarely invoked, but when it is, it seems to mean depriving the public of essential services.<sup>211</sup> This is probably rarely applicable to a no-poach agreement. But we have seen that some no-poach cases seem to view the “public” as the workers restrained from alternative employment without their consent.<sup>212</sup> That would seem to provide at least a rubric for consideration of what a number of courts seem to think is a salient factor in assessing these restraints.

Might that be addressed by agreements between employers and employees limiting the latter’s right to leave for another firm? At least one employer-side blog analyzing *Pittsburgh Logistics* suggested that employers might assuage some judicial concerns with no-poach agreements by “requiring employees to agree to refrain from seeking positions with any business partner for whom they have worked while they are employed or for a reasonable period after their employment ends.”<sup>213</sup> There is little doubt that many employees, most of whom sign whatever paperwork the employer puts in front of them, would often agree to such restraints if demanded as a condition of employment.<sup>214</sup> This would be a new legal animal, not a traditional noncompete agreement, since there is no link to competition with the employer in

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210. RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(b) (AM. L. INST. 1981).

211. See Sullivan, *Downsizing*, *supra* note 1, at 701–02.

212. See discussion *supra* note 199.

213. Daniel Green & Janene Marasciullo, *The Pennsylvania Supreme Court Nixes a No-Poach Agreement Between Business Partners as Overbroad*, EPSTEIN BECKER GREEN (June 1, 2021), <https://www.jdsupra.com/legalnews/the-pennsylvania-supreme-court-nixes-a-9322987> [<https://perma.cc/FM7G-NS7T>].

214. Jeanne Sahadi, *What to Do If You’re Asked to Sign a Non-Compete Agreement*, CNN BUS. (Dec. 10, 2019, 12:40 PM), <https://www.cnn.com/2019/12/10/success/noncompete-agreements/index.html> [<https://perma.cc/XWS8-9ZY6>].

any product or service market.<sup>215</sup> But, like an NCA, such an agreement would restrict employee mobility and therefore raise similar policy concerns.<sup>216</sup>

This analysis suggests that looking to NCA law is not a simple transplant and, thus, that the courts suggesting a different test may be on to something. But the difficulty with that alternative test is its vagueness. Recall that *Therapy Services, Inc. v. Crystal City Nursing Center, Inc.* looked to reasonableness between the parties or injury to the public: is it “such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interest of the public[?]”<sup>217</sup> Applying such a test is not only heavily contextual but is likely to lead to wildly different results in apparently similar settings.

In short, current doctrines seem unsatisfactory and a new approach called for. I suggest a few starting points.

First, the current concern with employee mobility reflected in enhanced skepticism of NCAs should be applicable to no-poach agreements. That does not mean they are per se invalid, but it does mean that courts should beware of allowing employers to end-run statutory restrictions on noncompetes by deploying no-poaches. As we have seen, no-poach agreements are most valuable to an employer that cannot rely on traditional NCAs to protect its interests.<sup>218</sup> This includes those in California<sup>219</sup> and the few other states broadly banning such

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215. See *Freund v. E.D. & F. Man Int'l, Inc.*, 199 F.3d 382, 385 (7th Cir. 1999) (indicating that employee knowledge would be an important factor in deciding the enforceability of a no-poach agreement in Illinois given the state's hostility to employee covenants not to compete).

216. Presumably, the threshold question would be whether there is a legitimate interest being protected, see *supra* note 200, although we have seen that the normal NCA analysis is ill-suited to this setting.

217. 389 S.E.2d 710, 711 (citing *Merriman v. Cover*, 51 S.E. 817, 819 (Va. 1905)).

218. Basanta, *supra* note 33, at 460–61.

219. California jurisprudence seems ambivalent about no-poach agreements, perhaps reflecting a tension between the state's strong public policy favoring employee mobility and a sense that the balance of interests may be different in this context. So far, the cases tend to refuse to enforce no-poaches while also refusing to declare them per se unenforceable. *E.g.*, *VL Sys., Inc. v. Unisen, Inc.*, 61 Cal. Rptr. 3d 818, 824 (Ct. App. 2007) (refusing to enforce a liquidated damages clause for \$60,000 but stressing that the employee neither worked for plaintiff at the time of the contract nor worked on plaintiff's account while working for defendant). *But see* *Webb v. W. Side Dist. Hosp.*, 144 Cal. App. 3d 946, 949, 952–53 (Ct. App. 1983), *overruled on other grounds*, *Moncharsh v. Heily & Blase*, 832 P.2d 899, 919 (Cal. 1992) (en banc); *cf.* *Silguero v. Creteguard, Inc.*, 113 Cal. Rptr. 3d 653, 655 (Ct. App. 2010) (recognizing a public

agreements,<sup>220</sup> but it also includes employers in states barring NCAs for certain classes of workers.<sup>221</sup> For example, in the franchise setting, the growing number of states declaring NCAs by low-wage workers invalid would render agreements by workers themselves unenforceable. Some of these laws may be drafted broadly enough to also preclude no-poach agreements,<sup>222</sup> but even those that are framed in terms of agreements between employers and employees may be viewed as establishing a public policy against restricting employee mobility.

Second, the judicial intuition that there is something problematic about limiting an employee's right to practice her profession or trade without her consent should be recognized as valid. That means, at a minimum, that courts should get out of the business of issuing injunctive relief barring hiring of employees and enforce such agreements by a damage award at most.<sup>223</sup> That result would not resolve the problem but would ameliorate its most obnoxious manifestations.

Third, as to monetary recovery, courts should take seriously the need to balance hardship to the affected employees against the employer's asserted interest. Protecting a leasing company's human inventory might justify a "conversion fee"<sup>224</sup> but only in an amount that reflects the leasing company's investment in those workers. Often, that will be minimal, and so the fee should be minimal. The analogy here is recoupment of training costs. While agreements with employees

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policy tort claim against a subsequent employer who terminated plaintiff out of "respect and understanding with colleagues in the same industry" when plaintiff did not comply with an invalid NCA).

220. See Sullivan, *Downsizing*, *supra* note 1, at 681–82; see also D.C. CODE § 32-581.01 (2021).

221. See Daniel J. Green, *New Maine Law Bans No-Poach Agreements and Dramatically Limits Noncompetes*, EPSTEIN BECKER GREEN (July 16, 2019), <https://www.tradesecretsandemployeemobility.com/2019/07/articles/non-compete-agreements/new-maine-law-bans-no-poach-agreements-and-dramatically-limits-noncompetes> [https://perma.cc/CZ64-VCRJ].

222. Flanagan, *supra* note 14, at 265–66. The Maine law explicitly reaches many agreements between employers. ME. REV. STAT. ANN. tit. 26, § 599-B (2021); see Green, *supra* note 221; see also 2019 Wash. Sess. Laws ch. 299 (explicitly barring restraints in the franchise relationship). Flanagan also cites the Illinois Day and Temporary Labor Services Act, which bars restraints for covered workers but permits a "placement fee" of 60 days of the agency's daily commission rate. Flanagan, *supra* note 14, at 269.

223. Whether an injunction might nevertheless issue when an employee has consented to the no-poach is a more complicated question although the requirement that plaintiff establish that a damages remedy is inadequate might foreclose such relief in most cases anyway. See discussion beginning *supra* note 166.

224. See *supra* text accompanying notes 47–48.

requiring repayment if the employee resigns within a specified period are permissible,<sup>225</sup> employers sometimes (maybe often) specify amounts far higher (and for a longer period) than any reasonable estimate would justify.<sup>226</sup> A recent article by Jonathan F. Harris suggests using unconscionability to police such agreements,<sup>227</sup> but, where a restraint on competition is concerned as in the no-poach setting, courts have no need to resort to the technicalities of that doctrine but can simply assess whether the stipulated amount bears a reasonable relationship to the employer's loss. While that would require judicial creativity, it is scarcely beyond a court's competence.

Fourth, even an agreement that passes these screens may be problematic. Elsewhere I have argued that an NCA should be unenforceable if the employee is terminated without cause.<sup>228</sup> Similarly, a no-poach agreement should be unenforceable in that

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225. *E.g.*, *Heder v. City of Two Rivers*, 295 F.3d 777, 779, 783 (7th Cir. 2002); *USS-Posco Indus. v. Case*, 197 Cal. Rptr. 3d 791, 801 (Ct. App. 2016); *see also* RESTATEMENT OF EMP. L. § 8.07 cmt. f (AM. L. INST. 2015) (“[A]n interest in recouping investments in the training of employees may justify repayment obligations but would not justify a restriction on competition.”); COLO. REV. STAT. 8-2-113(2) (2019) (permitting enforcement of repayment agreements against employees who serve less than two years). *See generally* Anthony Kraus, *Employee Agreements for Repayment of Training Costs: The Emerging Case Law*, 59 LAB. L.J. 213, 214 (2008); Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49 (2001) (arguing for recognition of protection of investment in training as a legitimate interest supporting an NCA); Rachel Arnov-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1221–22 (2001) (“[I]f the payments required are substantial, the agreement may prove more constraining [than a traditional NCA] because it forces the employee to produce cash and provides no option to comply with the agreement by refraining from competitive employment.”).

226. *See, e.g.*, *Am. Consulting Env't Safety Servs., Inc. v. Schuck*, 888 N.E.2d 874 (Ind. Ct. App. 2008) (unpublished table decision), 2008 WL 2346154, at \*4; *Heartland Sec. Corp. v. Gerstenblatt*, 2000 U.S. Dist. LEXIS 3496, at \*19–20 (S.D.N.Y. Mar. 22, 2000) (invalidating as unreasonable a training repayment provision whose “true purpose” was to prevent competition when “[r]equiring repayment of up to \$ 200,000, particularly of a recent college graduate in his first post-college job, approaches indentured servitude”); *Brunner v. Hand Indus., Inc.*, 603 N.E.2d 157, 161 (Ind. Ct. App. 1992) (invalidating an agreement which, “[d]epending upon the timing of an employee's termination and commencement of employment with a competitor,” could render the employee liable “for an amount in excess of *all wages received*.” Otherwise, the breaching employee is liable for an amount approximately equal to 1/2 to 2/3 of total wages received”).

227. Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 724, 750 (2021).

228. Sullivan, *Downsizing*, *supra* note 1, *passim*.

situation since it is the employer that chooses to forfeit the benefits of any training provided.

Finally, a court could take into account the overall effect of the no-poach in question as to whether it is simply too much of a restraint on the labor market. That would require assessing some of the factors looked to in any antitrust analysis, including the extent of the no-poach, the availability of other potential employers, and the strength of the employer's asserted justifications.<sup>229</sup> Especially where foreclosing work for the new employer would dramatically narrow the employee's opportunities for mobility, the courts should hesitate to enforce restraints.

#### CONCLUSION

The nation is currently reconsidering its approach to labor market restraints and is doing so from federal and state antitrust perspectives as well as more focused state statutory initiatives. This Article suggests both that state common law has a role to play and that that role should reach beyond traditional postemployment restraints agreed to by employers and their employees to embrace no-poach agreements between employers as described in this Article. Indeed, as legal regimes tighten on NCAs, it is almost certain that more employers will look to no-poach agreements to achieve their goals.

Such an exercise will require breaking new ground, but this Article sketches some ways in which courts may put a procompetitive thumb on the scale. However, the limits of any such common law response must be noted. Perhaps, given potential antitrust liability, uncertain legality, and these difficulties of enforcement, employers may need to reconsider the utility of no-poach agreements. But counterbalancing that reconsideration is the possibility that, if the risk of antitrust liability seems remote in a given context, such agreements may continue to be useful to businesses even if not legally enforceable. They will, after all, tend to suppress competition in the labor market, which often will be in the parties' mutual interest. The "stick" of unenforceability works only so far as the interests of the parties to a no-poach diverge. Fortunately, the cases in which the issue arises suggest that is not infrequent. But in any reconsideration of competition law, the creation of meaningful sanctions for unreasonable no-poach agreements should be high on the agenda.

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229. *See supra* note 14.